Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

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of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 12 and 127

(T.D. 83-158)

Customs Regulations Amendments Relating to Special Classes of Merchandise

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final Rule.

SUMMARY: This document amends the Customs Regulations to regulate the entry of any chemical substance, imported in bulk or as part of a mixture into the customs territory of the United States. The rule also governs the importation of certain articles containing hazardous chemicals that the Environmental Protection Agency ("EPA") specifically regulates. The rule, which was developed after consultation with EPA, implements the Toxic Substances Control Act ("TSCA") by requiring the importer of a chemical shipment to certify at the port of entry that either the shipment is subject to TSCA and complies with all applicable rules and orders thereunder, or is not subject to TSCA.

EFFECTIVE DATE: October 1, 1983.

FOR FURTHER INFORMATION CONTACT: Harrison C. Feese, Entry Examination and Liquidation Branch, Duty Assessment Division, Office of Trade Operations, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229, 202-566-8651; or Jack McCarthy, Director, TSCA Assistance Office (TS-799), Office of Pesticides and Toxic Substances, Environmental Protection Agency, Rm. E-511B, 401 M Street, SW., Washington, D.C. 20460, 800—424-9065 (Toll Free), calls within the District of Columbia 554-1404, outside the United States: Operator—202-554-1404.

SUPPLEMENTARY INFORMATION:

Background

The Toxic Substances Control Act ("TSCA"), Pub. L. 94-469, approved October 11, 1976 (15 U.S.C. 2612), was enacted by the Congress to regulate commerce and protect human health and the environment by requiring testing and necessary use restrictions on certain chemical substances, and for other purposes. Section 13,

TSCA, directs the Secretary of the Treasury, after consultation with the Administrator, Environmental Protection Agency ("EPA"), to refuse entry into the customs territory of the United States (the "customs territory") of any chemical substance, mixture, or article containing a chemical substance or mixture that: 1. Fails to comply with any rule in effect under TSCA, or 2. Is offered for entry in violation of section 5 or 6, TSCA, a rule or order issued under section 5 or 6, or an order issued in a civil action brought under section 5 or 7, TSCA.

Section 13 further provides that if a chemical substance, mixture, or article is refused entry, the Secretary shall notify the consignee of the entry refusal, not release the shipment, except under bond, and cause its disposal or storage under such rules as the Secretary may prescribe if the shipment has not been exported by the consignee within 90 days from the date of receipt of the notice of entry refusal.

To implement the provisions of section 13, by notice published in the Federal Register on December 1, 1980 (45 FR 79730), Customs and EPA proposed amendments to Parts 12 and 127, Customs Regulations (19 CFR Parts 12, 127), to regulate the entry of any chemical substance, imported in bulk or as part of a mixture into the customs territory. The rule also governs the importation of certain articles containing hazardous chemicals that EPA specifically regulates. On the same date, by notice published in the Federal Register (45 FR 79726), EPA issued a proposed policy statement concerning its responsibilities under the proposed rule.

Numerous comments were received by EPA and Customs in response to the above proposals. While most commenters agreed with the objectives of the proposed rule, the following concerns were expressed.

Comments on Proposed Rule

DEFINITION OF IMPORTER

Comment: The proposal defines importer too broadly. Only the consignee should sign the certification statement required by proposed section 12.121.

Response: The language of section 13 refers to liability of the owner and consignee. These are two of the possible importers who may sign the certification statement. The rule uses the broader Customs definition of importer for several reasons. (1) As a practical matter, since the rule involves entering goods through Customs, allowing the person who normally acts as the importer for Customs transactions (i.e., importer of record) to sign the certification statement is least disruptive, confusing, and burdensome for industry and Customs. (2) The section 13 language encompasses all rules under TSCA, therefore the section 13 definition of importer must be broad enough to cover any TSCA definition of importer. Under

other sections of TSCA the importer is defined as a manufacturer, and in some cases this importer-manufacturer may be a person other than the consignee. Thus, section 13 should not limit the importer definition to only the consignee. (3) The importer who signs the certification statement, unlike the importer responsible for other TSCA requirements such as premanufacture notification, need not be the "most" knowledgeable person about the chemical shipment, as long as he is assured that the shipment meets the requirements of TSCA. Thus, any authorized person who meets the information requirements may sign the certification statement, at the convenience of the parties to the importation.

Mechanics of Certification

Comment: The rule should allow the certification statement to be typed, stamped, or preprinted and submitted as an attachment to an appropriate entry document or commercial invoice.

Response: In developing the proposal, EPA and Customs considered whether the certification statement should appear on an existing or on a separate and new entry document. To avoid creating additional paperwork at the port of entry, the proposed rule stated that the certification statement should appear on an existing entry document. The proposal specified that the statement be typed for legibility. We considered that the importer would ordinarily type and sign the statement on an entry document or invoice in the course of business in arranging for the import. However, we agree with the comment and have changed the rule to allow the importer the options of having the certification statement typed or stamped on an existing entry document or invoice, or on a preprinted attachment to an entry document or invoice.

Comment: Facsimile signatures should be allowed, particularly for repeat shipments.

Response: We agree with this comment, and have added a new paragraph (c) to proposed section 12.121.

Comment: The rule should not be effective until 90 days after publication so that goods ordered before the effective date can clear ports of entry and importers can educate themselves and foreign suppliers of the rule's requirements.

Response: The time a shipment leaves a port should have no bearing on the effective date. Importers are presently aware that all shipments of chemical substances must be in conformance with TSCA rules and they are merely being asked to certify that fact after the shipment arrives. However, to allow sufficient time to review the requirements, we are providing additional time before the effective date.

Comment: The rule should address the problem of shipments of chemicals on which TSCA rules are promulgated during shipment.

Response: Importers should be aware of proposed TSCA rules to be able to comply when a rule becomes final. The additional days

between promulgation and effective date should allow sufficient time for importers to determine how a rule applies to a particular importation.

Comment: Because the proposed certification does not require information to be submitted to either EPA or Customs, description of the scope of the certification should not say all required information submittals are complete and accurate.

Response: We agree with this comment, and have changed the certification accordingly.

Comment: Proposed section 12.121 should specify reasonable steps an importer must take to be assured that a chemical substance and its import comply with TSCA. The certification statement should include the language that it is "based on inquiries in conformance with 19 CFR 12.121."

Response: Customs and EPA disagree. Proposed section 12.121 is properly limited to activities involving actual entry of chemical shipments which fall within the enforcement jurisdiction of Customs. It is beyond the scope of the proposed regulations to set forth the procedures that an importer must take before entry to ensure an import's technical compliance with TSCA. These procedures are explained in the EPA policy statement to be published soon.

Comment: The rule should clarify that all chemical products entered under Schedule 4, Tariff Schedules of the United States (TSUS), require TSCA certification.

Response: Many—but not all—chemical substances as defined under TSCA would be entered under Schedule 4, TSUS. For example, chemicals or mixtures imported as metal-bearing ones under Schedule 6, TSUS, would require TSCA certification. Not all imports under Schedule 4, TSUS, are chemical substances requiring certification under TSCA. For example, chemicals imported as pesticides under items 408.16–408.38, TSUS, would not require TSCA certification. Importers may contact the EPA Regional Office or the EPA TSCA Assistance Office to determine whether a specific chemical intended for importation is subject to TSCA.

DETENTION

Comment: The proposal would allow detention at the port of entry for noncompliance arising from TSCA sections 5, 6, or 7, or "as otherwise directed by the Administrator." The rule should state the other circumstances that would cause the Administrator to direct that a shipment be detained.

Response: EPA has determined that detention would invariably result from noncompliance with TSCA section 5, 6, or 7. Thus, the language regarding detention "as otherwise directed by the Administrator", is deleted.

Comment: The rule should specify the "reasonable grounds" on which a shipment would be detained at the port of entry. There

should be good cause, not mere suspicion of noncompliance to detain a shipment.

Response: The rule allows for detention at the port of entry when a certification statement is missing, or when there are reasonable grounds to believe that a shipment does not comply with TSCA. "Reasonable grounds" means there is an objective reason to believe that a shipment does not comply. This reason will be specified in the detention notice.

Comment: The reasons for detention and the remedial actions to be taken to have a shipment released, should be included in the detention notice.

Response: The proposal states that the detention notice shall include the reasons for detention. The importer may get assistance from EPA in determining the remedial actions to be taken to bring the shipment into compliance. This is specified in the EPA policy statement.

Comment: The importer should be promptly notified of detention by telephone, followed by written notice.

Response: It is Customs policy to promptly notify the importer or his agent when it is determined that a shipment may not be released from Customs custody. However, because of local conditions it may not be practical to notify by telephone. Therefore, the method of notification should be left to local Customs officials in accordance with local practice.

Comment: EPA should simultaneously notify Customs and the importer of its decision regarding the compliance status of detained shipments.

Response: EPA agrees with this comment and will do so.

Comment: Some commenters stated that the importer should be notified of detention by Customs within 48 or 72 hours, rather than given "prompt" notice as proposed.

Response: Customs disagrees. The establishment of a specific time limit or deadline within which Customs must notify the importer of detention is arbitrary and would impose an undue administrative burden on the agency.

Comment: Detained shipments should be automatically released if EPA does not act within a specified time period.

Response: EPA will act within the specified time periods, so there is no need for an automatic release. An automatic release would not be appropriate since a purpose of section 13 is to deny entry to shipments that do not comply with TSCA, and a shipment would have been detained only if there were reason to suspect that it did not comply.

Comment: The proposal would allow importers 20 days from the date of detention to submit documentation showing why a shipment should be allowed entry. EPA must allow or deny entry within 30 days from the date of detention.

A commenter pointed out that if the importer takes 20 days to submit information, only 10 days remain for EPA to determine whether the importation should be allowed. Also, there is no advantage for an importer to make his submission in fewer than the allowed 20 days, since the earlier an importer does so, the more time would remain in the 30 days from detention within which EPA must respond. The commenter suggested the rule state that EPA allow or deny entry within 10 days after the importer submits his materials. This change would not alter the length of time for EPA's response, but would allow the importer who files promptly to receive a more prompt response from EPA.

Response: EPA agrees. The final rule provides that EPA will decide to allow or deny entry within 10 days of receipt of the importer's submission, or within 30 days from the date of detention, whichever comes first.

Comment: There were several comments about time limits. One commenter said the rule should allow the importer 90 days after notice of refusal of entry, rather than 90 days after notice of detention, to bring the shipment into compliance or export it. The importer would not begin planning export until at least 30 days after the notice of detention, when the goods would be denied entry.

Another commenter said importers should be allowed 60 days from the date of redelivery demand to bring a shipment into compliance or export it. There should not be a time disadvantage for shipments released on bond. According to the comment, the time disadvantage may be an incentive to abandon goods.

Response: Customs believes that 90 days after notice of detention gives the importer sufficient time to bring the shipment into compliance or export it.

Comment: Three extensions should be allowed when the importer is delayed in complying with TSCA for causes beyond his control, such as delays caused by EPA or Customs.

Response: Customs disagrees. The proposal grants an extension of 30 days, if due to delays caused by Customs or EPA, the importer is unable to bring a shipment into compliance with TSCA, or is unable to export it within the required time. Customs believes that one time extension is sufficient under the circumstances. Any additional extensions would be excessive and frustrate the intent of the Act.

ENFORCEMENT

Comment: The proposed rule and policy statement allow both EPA and Customs to take enforcement action. This unnecessarily requires establishing two separate Government enforcement mechanisms for the same violation, increases the importer's potential liability, and causes an importer to deal with two separate agencies in enforcement matters. One comment suggested that one

of the agencies should state a policy of deferring to the other, except in cases of deliberate violation.

Response: Depending on the circumstances, EPA or Customs or both may take enforcement action under TSCA. However, Customs enforcement responsibilities will end with its release of the merchandise unless entry is made under a "use" provision of the TSUS. This will not necessarily require two separate enforcement mechanisms for the same violation, since in many cases it would be appropriate for only one agency to act. This does not increase the importer's potential liability both under TSCA and under Customs statutes and regulations.

Comment: It is not clear how Customs will verify the certification statement.

Response: Generally, Customs will not verify a certification statement. However, EPA intends to investigate the accuracy of some certification statements. In addition, if there is reason to believe that a certification is false, EPA or Customs will investigate as with any suspected false statement made in connection with an entry.

Scope

Comment: Congress intended section 13 only for Customs to prevent the importation of hazardous chemicals, not for EPA to use as a tool for the overall enforcement of TSCA.

Response: Section 13 prohibits the importation of any chemical that "fails to comply with any rule in effect under this Act." Thus, section 13 is intended as a tool for enforcement of all TSCA import provisions. While the TSCA directs the Secretary of the Treasury to refuse entry of chemical imports that do not comply with TSCA requirements, as a practical matter, EPA—rather than Customs—will ultimately determine whether an import complies.

Who Should Certify?

Comment: Comments were mixed on whether an agent or broker should certify an import's compliance with TSCA. Some comments said brokers should not be required to sign the certification statement because they do not have sufficient information regarding the shipment.

Other comments said brokers should be able to sign the certification statement on behalf of the actual user of the chemical import. The broker could rely on a bona fide certification from the importer with sufficient knowledge of the shipment.

Response: EPA agrees that a broker can certify based on information obtained from his principal in the ordinary course of business.

Comment: An individual who certifies on behalf of an importing company should not be personally liable for false statements. Penalties should apply only to the corporate entity.

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Response: TSCA section 16 describes penalties that "any person" who violates the Act may incur. Although TSCA does not explicitly define "person," the term as used in the Act clearly includes individuals or agents. However, EPA recognizes that an agent may not be responsible for a violation and that the principal may be held liable.

Comment: The importer should be able to fulfill his obligations by presenting a certification from the foreign manufacturer that the chemical substance complies with TSCA.

Response: EPA disagrees. The foreign manufacturer is not under TSCA's jurisdiction and thus cannot be held liable for noncompliance. The responsibility to certify is the importer's. His responsibility may not be completely discharged with a certification from the foreign manufacturer if it is determined that a shipment does not comply.

Chemicals Subject To Certification

Comment: Comments requested exemptions from certification for several categories of chemical substances: (a) Those unintentionally present in the import shipment, such as byproducts, coproducts, and impurities; (b) small quantities for research and development (as defined by Inventory criteria at 40 CFR 710.2(y)); (c) samples imported for testing; and (d) chemicals subject to significant new use requirements.

Response: The importer must look to a TSCA section 5, 6, or 7 rule or order to determine whether the above exemptions apply. For example, presently section 5 requirements exempt importers from submitting premanufacture notices on byproducts or impurities provided they are not imported for separate commercial purposes. Thus, the importer would be required to determine the compliance status under section 5 only for chemical substances intentionally present in the shipment. The importer's certification would mean that the intentional import complied with section 5, and that any unintentionally present chemicals also complied with section 5 simply because they were exempt from these requirements.

Similarly, small quantities for research and development are now also exempt from section 5 requirements. For such imports, the importer's certification statement might be based on information from the consignee that the shipment is intended only for research and development. In this situtation, the importer could truthfully certify that the shipment complies with TSCA, without need to determine if the imported chemicals are on the TSCA Inventory.

Research and development includes quality control testing, and testing for the development of a product. If samples are imported only for testing, the samples would be considered as research and development chemicals.

When EPA promulgates significant new use rules, importers will be responsible for determining whether their imports contain chemical subject to the rules. If so, the importer must ascertain that the intended use of the chemical complies with TSCA.

Comment: Several commenters stated that the certification statement should include language about chemicals exempted from TSCA. They are concerned that there is potential for confusion at the point of entry because some chemical shipments obviously will not be subject to TSCA. For example, chemicals imported solely for use as pharmaceuticals or pesticides are not chemical substances, or articles under TSCA requiring certification. It is suggested that the certification contain an exemption clause for these articles, or that a separate non-TSCA certification statement be required to help Customs identify TSCA and non-TSCA imports, so as to avoid potentially delaying entries.

Response: We agree. Accordingly, the rule is changed to require importers of non-TSCA regulated chemicals to certify that their shipments are not subject to TSCA. The authority for requiring this negative certification is found in 19 U.S.C. 1484 and 1485.

Meaning and Basis for Certification

Comment: The wording of the certification statement should include compliance only with TSCA sections 5, 6, and 7, instead of "all rules" under TSCA because the certification does not cover TSCA section 4 or 8.

Response: The language of the certification has been changed to read "all applicable rules and orders under TSCA."

Comment: The proposed certification statement is redundant. The importer should not need to certify both that the imported chemicals "comply with all rules under TSCA" and that he is "not offering a chemical substance for entry in violation of TSCA or any order under TSCA."

Response: The certification statement was constructed to parallel the language in TSCA section 13(a)(1) (A) and (B). The requirements under 13(1)(a) pertain to the commodity itself, such as the requirements for PCB's under section 6. The requirements under 13(1)(B) pertain to obligations imposed by or under TSCA on the importer, such as the obligation under section 5(a) to file a premanufacture notice for "new" chemicals. The certification statement uses two separate phrases to acknowledge the distinction between requirements imposed directly on commodities, and duties imposed on importers.

Comments: Several commenters recommended changing the certification statement to reduce the potential liability of importers who may not be in a position to know the facts needed to determine whether a shipment complies with TSCA. They argue that the importer may not have the specialized knowledge to determine if the chemical supplied actually complies. Or, necessary information

may be confidential and the foreign supplier unwilling to divulge it. To alleviate this problem, one recommendation was for the certification to be signed on "behalf of" the importer. Another recommendation was to allow the importer to certify "to the best of his knowledge and belief."

Response: The certification statement does not include the phrase "to the best of my knowledge and belief" because this would defeat the purpose of the certification. An importer who did not know and had made no attempt to discover whether a chemical complied with TSCA could truthfully declare that "to the best of his knowledge and belief" the shipment complied.

Special Chemical Import Report Forms

Comment: Commenters gave several reasons to delete the provision in proposed section 12.121, Customs Regulations, for the Special Chemical Import Report Form. (1) The proposed form would exceed Customs authority under section 13. The statute does not allow the Secretary of the Treasury to require importers to report information. (2) The form would be unnecessary and burdensome since EPA has the authority to require substantiation of certification on a case-by-case basis. (3) Obtaining the information on particular chemicals would not be a problem for importers unless it were also a problem for the domestically manufactured chemical. Such a rule would be a non-tariff trade barrier if it did not also apply to domestically manufactured chemicals. (4) EPA authority to issue such a form is doubtful since EPA has determined that the import certification does not apply to TSCA section 4 or 8 rules, but authority for the special import form would be under section 6 or 8. (5) No additional documents should be required at the port of entry.

Response: While EPA does not necessarily agree with these comments, we have deleted this provision until actual need arises.

Export

Comment: Export notification should not be required for rejected entries that were never officially in the United States, and especially should not be required for chemicals that are returned to their country of origin after being denied entry. If export notice is required for such chemicals under TSCA section 12(b), it should not also be required under section 13.

Response: The language of section 13 argues that export of an entry that is rejected under section 13 is an export under section 12(b). However, after considering these comments, it has been determined that export notification is necessary only for the chemicals that are regulated under TSCA. A section 12(b) export notice will be required for a chemical denied entry only when a TSCA section 5, 6, or 7 rule or order applies to the chemical, and it is not being returned to the country of origin.

BURDEN

Comment: The certification requirement is burdensome and may discourage the importation of small quantities of chemicals.

Response: Customs disagrees. The certification requirement is not burdensome because the importer is already obligated to know that any chemicals imported must be in compliance with TSCA. The additional cost of certification will not discourage the importation of small quantities of chemicals.

Comment: The economic analysis should consider alternative regulatory approaches that do not include certification. It should also consider the potential costs to the public from delay at the port of entry.

Response: The economic analysis of the proposed section 13 estimated costs to importers required to certify at the port of entry, and compared these costs to alternative approaches that would not require formal certification. No significant cost differences were found to exist. The analysis also discusssed the difficulties in estimating administrative costs. Even if it were possible to estimate administrative costs—such as costs of delay—that may result from noncompliance with section 13, EPA would not consider such costs appropriate to include in the economic impact analysis.

INTERNATIONAL CONCERNS

Comment: The EPA policy discriminates against foreign suppliers because it does not allow exporters to maintain compositional confidentiality in all cases.

Response: EPA does not agree. The regulation does not require the foreign supplier to reveal chemical identities to anyone. The importer may choose to rely on the foreign supplier's assurance of compliance with TSCA, although this would not completely discharge the importer's responsibility. The policy does not require foreign suppliers to identify chemical imports to other persons at the entry port or elsewhere.

Among several reasons for the approach adopted, one was recognition that the chemical identities of many imports are trade secrets. EPA does not wish to require importers to obtain compositional information from their foreign suppliers when domestic processors would not be required to obtain similar information from domestic suppliers.

Comment: The section 13 requirements create unnecessary technical obstacles to foreign trade.

Response: EPA disagrees. The rule does not create obstacles since importers should already be aware of and complying with TSCA requirements pertaining to imports. The certification itself is simply a method to verify that importers are aware of and meeting their responsibilities and obligations.

Information Availability

Comments: Comments were mixed on how EPA could best distribute information on the section 13 requirements. Some commenters said that EPA lacks statutory authority to issue fact sheets and that such fact sheets would be confusing and wasteful. Other commenters said that EPA should regularly distribute a checklist of TSCA rules for importers to distribute to their suppliers, since importers are in the best position to educate their foreign suppliers about these to U.S. embassies, U.S. Customs offices abroad, and foreign boards of trade. Fact sheets should especially include information on significant new use rules.

Response: To meet the purposes of section 13, EPA intends to make information about the requirements available by distributing fact sheets on current TSCA requirements, and by answering telephone inquiries through the EPA TSCA Assistance Office. Statutory authority is not necessary to distribute this information.

EPA does not agree that issuing fact sheets would be confusing. It would be easier for importers and suppliers to determine compliance if a current list of all TSCA rules is available to them.

Importers are in the best position to inform their foreign suppliers of TSCA requirements, or they may wish to have their foreign suppliers receive information directly from EPA. Anyone may contact the TSCA Assistance Office to be placed on its mailing list for TSCA section 13 and other TSCA literature, including any significant new use rules. U.S. embassies, U.S. Customs offices abroad, and foreign boards of trade will automatically be placed on the mailing list.

Economic Impact Analysis Statement

Estimated costs for industry compliance with this regulation are contained in a report entitled, "Economic Impact Assessment of the Section 13 Importer Regulations of the Toxic Substances Control Act," dated November, 1979. This report indicates that total cost to industry will be approximately $2.3 million.

The economic impact study is available for review at the Environmental Protection Agency, Office of Pesticides and Toxic Substances, Reading Room, Room 447 East Tower, 401 M Street, SW., Washington, D.C. 20460.

Executive Order 12291

It has been determined that this document does not contain a "major rule" requiring preparation of a regulatory impact analysis under Executive Order 12291.

REGULATORY FLEXIBILITY ACT

It is certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that this rule will not have a significant economic impact on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of the document was Jesse V. Vitello, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service (202-566-8237). However, personnel from other Customs offices and EPA participated in its development.

LIST OF SUBJECTS IN 19 CFR PARTS 12 AND 127

Customs duties and inspection, importers, hazardous materials, explosives, and freight.

REGULATIONS AMENDMENTS

Parts 12 and 127, Customs Regulations (19 CFR Parts 12, 127), are amended as set forth below.

ALFRED R. DEANGELUS,
Acting Commissioner of Customs.

Approved: April 13, 1983.
ROBERT E. POWIS,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, August 1, 1983 (48 FR 34734)]

PART 12—SPECIAL CLASSES OF MERCHANDISE

Part 12, Customs Regulations (19 CFR Part 12), is amended by adding a center heading and § 12.118 through 12.127 to read as follows:

Chemical Substances in Bulk and as Part of Mixtures and Articles

§ 12.118 Toxic Substances Control Act.

The importation into the customs territory of the United States of a chemical substance in bulk or as part of a mixture, or article *containing a chemical substance or mixture,* is governed by the Toxic Substances Control Act ("TSCA") (15 U.S.C. 2601 *et seq.*), and by regulations issued under the authority of section 13(b), TSCA (15 U.S.C. 2612(b)) by the Secretary of the Treasury in consultation with the Administrator, Environmental Protection Agency ("EPA").

§ 12.119 Scope.

Sections 12.120 through 12.127 apply to the importation into the customs territory of the United States of chemical substances in bulk and as part of mixtures under TSCA. Sections 12.120 through 12.127 also apply to articles containing a chemical substance or

mixture if so required by the Administrator by specific rule under TSCA.

§ 12.120 Definitions.

Except as otherwise provided below, the terms used in §§ 12.121 through 12.127 have the meanings set forth for those terms in TSCA.

(a) "Article"

(1) "Article" means a manufactured item which:

(i) Is formed to a specific shape or design during manufacture,

(ii) Has end use functions dependent in whole or in part upon its shape or design during the end use, and

(iii) Has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article and that may occur as described in § 12.120(a)(2) below; except that fluids and particles are not considered articles regardless of shape or design.

(2) The allowable changes of composition, referred to in § 12.120(a)(1), are those which result from a chemical reaction that occurs upon the end use of other chemical substances, mixtures, or articles such as adhesives, paints, miscellaneous cleaners or other household products, fuels and fuel additives, water softening and treatment agents, photographic films, batteries, matches, and safety flares in which the chemical substance manufactured upon end use of the article is not itself manufactured for distribution in commerce or for use as an intermediate.

(b) "Chemical substance in bulk form" means a chemical substance (other than as part of a mixture or article) in containers used for purposes of transportation or containment, provided that the chemical substance is intended to be removed from the container and has an end use or commercial purpose separate from the container.

§ 12.121 Reporting requirements.

(a) *All chemical substances in bulk or mixtures.* The importer of a chemical substance, imported in bulk or as part of a mixture, shall certify to the district director at the port of entry that the chemical shipment is subject to TSCA and complies with all applicable rules and orders thereunder, or is not subject to TSCA. The importer, or his authorized agent, shall sign one of the following statements:

I certify that all chemical substances in this shipment comply with all applicable rules or orders under TSCA and that I am not offering a chemical substance for entry in violation of TSCA or any applicable rule or order thereunder.

I certify that all chemicals in this shipment are not subject to TSCA. The certification, which shall be filed with the district director at the port of entry before release of the shipment, may appear as a typed or stamped statement:

(1) On an appropriate entry document or commercial invoice, or on a preprinted attachment to such entry or invoice.

(2) On the commercial invoice or an attachment to the invoice, in the event of release under a special permit for an immediate delivery, as provided for in section 142.21 of this chapter, or entry, as provided for in section 142.3 of this chapter.

(b) *Chemical substance or mixture as part of articles.* Each importer of a chemical substance or mixture as part of an article shall meet the reporting requirements set forth in paragraph (a) of this section only if required by a rule or order under TSCA.

(c) *Facsimile signatures.* The certification statements in paragraph (a) may be signed by means of an authorized fascimile signature.

§ 12.122 Detention of certain shipments.

(a) The district director at the port of arrival shall detain, at the importer's risk and expense, shipments of chemical substances mixtures, or articles:

(1) Which have been banned from the customs territory of the United States by a rule or order issued under section 5 or 6 of TSCA (15 U.S.C. 2604 or 2605) or

(2) Which have been ordered seized because of imminent hazards as specified under section 7 of TSCA (15 U.S.C. 2606).

(b) The district director at the port of entry shall detain shipments of chemical substances, mixtures, or articles at the importer's risk and expense, in the following situations:

(1) Whenever the Administrator has reasonable grounds to believe that the shipment is not in compliance with TSCA and notifies the district director to detain the shipment.

(2) Whenever the district director has reasonable grounds to believe that the shipment is not in compliance with TSCA; or

(3) Whenever the importer fails to certify compliance with TSCA as required by § 12.121.

(c) Upon detention of a shipment, the district director shall give prompt notice to the Administrator and the importer. The notice shall include the reasons for detention.

(d) A detained shipment shall not be held in the custody of the district director for more than 48 hours after the date of detention. Thereafter, the shipment shall be promptly turned over to the Administrator for storage or disposition as provided for in section 12.127 and 127.28(i), unless previously released to the importer under bond as provided in section 12.123(b). Notice of intent to abandon the shipment by the importer shall constitute a waiver of all time periods specified in Parts 12 and 127.

§ 12.123 Procedure after detention.

(a) *Submission of written documentation.* If a shipment is detained by a district director under section 12.122, the importer may submit written documentation to the Administrator with a copy to

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the district director within 20 days from the date of notice of detention, to show cause why the shipment should not be refused entry. If an importer submits that documentation, the Administrator shall allow or deny entry of the shipment within 10 days of receipt of the documentation, and in any case shall allow or deny entry of the shipment within 30 days of the date of notice of detention.

(b) *Release under Bond.* The district director may release to the importer a shipment detained for any of the reasons given in § 12.122 when the district director has reasonable grounds to believe that the shipment may be brought into compliance, or when the district director deems it appropriate under § 141.66 of this chapter. Any such release shall be conditioned upon furnishing a bond on Customs Form 7551, 7553, or 7595 for the return of the shipment to Customs custody. The bond shall be for the full amount required in § 113.14 of this chapter. If a shipment of chemical substance, mixture, or article is released to the importer under bond, the shipment shall be held intact and shall not be used or otherwise disposed of until the Administrator makes a final determination on entry as provided for in paragraph (c) of this section.

(c) *Determination by the Administrator.* After consideration of the available evidence and within 30 days from the notice of detention, the Administrator shall notify the district director and the importer of his decision either to permit or refuse entry of the shipment. If the administrator finds that the shipment is in compliance with TSCA, the district director shall release the shipment to the importer. If the Administrator finds that the shipment in not in compliance, the district director shall:

(1) Refuse delivery to the importer, given reasons for such refusal, or

(2) If the shipment has been released on bond, demand its redelivery under the terms of the bond, giving reasons for such demand. If the merchandise is not redelivered within 30 days from the date of the redelivery notice, the district director shall assess liquidated damages in the full amount of the bond.

§ 12.124 Time limitations and extensions.

(a) *Time limitations.* The importer of a shipment of chemical substances, mixtures, or articles which has been detained under § 12.122 shall bring the shipment into compliance with TSCA or export the shipment from the customs territory of the United States within 90 days after notice of detention or 30 days of demand for redelivery, whichever comes first.

(b) *Time Extensions.* The district director, upon notification by the Administrator, may grant an extension of not more than 30 days if, due to delays caused by the Environmental Protection Agency or the Customs Service:

(1) The importer is unable, for good cause shown, to bring a shipment into compliance with the Act within the required time period; or

(2) The importer is unable to export the shipment from the customs territory of the United States within the required time period.

§ 12.125 Notice of exportation.

Whenever the Administrator directs the district director to refuse entry under § 12.123 and the importer exports the non-complying shipment within the 90 day period of notice of refusal of entry or within 30 days of demand for redelivery, the importer shall give written notice of the fact of exportation to the Administrator and the district director. The importer shall include the following information in the notice of exportation:

(a) The name and address of the exporter or his agent;

(b) A description of the chemical substances, mixtures, or articles exported.

(c) The destination (country);

(d) The port of arrival at the destination;

(e) The carrier;

(f) The date of exportation; and

(g) The bill of lading or the air way bill number.

§ 12.126 Notice of abandonment.

If the importer intends to abandon the shipment after receiving notice of refusal of entry, the importer shall present a written notice of intent to abandon to the district director and the Administrator. Notification under this section is a waiver of any right to export the merchandise. The importer shall remain liable for any expense incurred in the storage and/or disposal of abandoned merchandise.

§ 12.127 Decision to store or dispose.

A shipment detained under section 12.122 shall be considered to be unclaimed or abandoned and shall be turned over to the Administrator for storage or disposition as provided for in section 127.28(i) of this chapter if the importer has not brought the shipment into compliance with TSCA and has not exported the shipment within time limitations or extensions specified according to section 12.124. The importer shall remain liable for any expenses in the storage and/or disposal of abandoned merchandise.

(Section 13, 90 Stat. 2034 (15 U.S.C. 2612), R.S. 251, as amended (19 U.S.C. 66) and section 624, 46 Stat. 759 (19 U.S.C. 1624)).

PART 127—GENERAL ORDER, UNCLAIMED, AND ABANDONED MERCHANDISE

Part 127, Customs Regulations (19 CFR Part 127), is amended by adding a new paragraph (i) to § 127.28, to read as follows:

§ 127.28 Special merchandise.

* * * * * * *

(i) *Chemical substances, mixtures, and articles containing chemical substances or mixtures.* Chemical substances, mixtures, and articles containing a chemical substance or mixture, as these items are defined in section 3, Toxic Substances Control Act ("TSCA") and section 12.120 of this chapter, shall be inspected by a representative of the Environmental Protection Agency to ascertain whether they comply with TSCA and the regulations and orders issued thereunder. If found not to comply with these requirements they shall be exported or otherwise disposed of immediately in accordance with the provisions of §§ 12.125 through 12.127 of this chapter.

(Section 13, 90 Stat. 2034 (15 U.S.C. 2612), R.S. 251, as amended (19 U.S.C. 66), and sections 484, 485, 624; 46 Stat. 759 (19 U.S.C. 1484, 1485, 1624)).

(T.D. 83-159)

Reimbursable Services—Excess Cost of Preclearance Operations

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., July 29, 1983.

Notice is hereby given that pursuant to Section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess costs for each preclearance installation are determined to be as set forth below and will be effective with the pay period beginning August 7, 1983.

Installation	Biweekly excess cost
Montreal, Canada	$19,162
Toronto, Canada	31,607
Kindley Field, Bermuda	9,481
Nassau, Bahama Islands	19,631
Vancouver, Canada	12,223
Winnipeg, Canada	5,665
Freeport, Bahama Islands	8,315
Calgary, Canada	11,771
Edmonton, Canada	6,034

WILLIAM H. RUSSELL,
Comptroller.

[Published in the Federal Register, August 3, 1983 (48 FR 35223)]

(T.D. 83-160)

Change of Practice Relating to Tariff Classification of Certain Powernet Fabric

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document gives notice of a change of an established and uniform practice of classifying certain powernet fabric as netting for tariff purposes. This change of practice will result in the reclassification of such fabric, which is used in the manufacture of women's foundation and body support garments, under the provision in the tariff schedules for knit fabrics, of man-made fibers, at a higher rate of duty than was previously assessed.

EFFECTIVE DATE: November 7, 1983.

FOR FURTHER INFORMATION CONTACT: Phil Robins, Classification and Value Division, U.S. Customs Service, 1302 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On November 16, 1982, a notice was published in the Federal Register (47 FR 51587) advising that Customs was reviewing its current established and uniform practice of classifying certain powernet fabric under the provision for netting, in the piece, made on a lace, net, or knitting machine, other, in item 352.80, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202). As part of this review, Customs requested comments on its proposal to reclassify such fabric under the provision for knit fabrics, of man-made fibers, in item 345.50, TSUS, at a higher rate of duty. Comments were to have been received on or before January 17, 1983. However, no comments were received.

As indicated in the notice, information has been made available to Customs to indicate that although the term "powernet" may have commerical significance to the consumer in a marketing or merchandising sense, the term is in fact a misnomer because the actual construction of the fabric in question is that of a knit fabric. In addition, it appears that powernet fabrics are not known technically by experts in the trade as net fabrics, and garments made from powernet fabrics are classified by Customs as knit garments.

CHANGE OF PRACTICE

On the basis of the above information, Customs has determined that the established and uniform practice of classifying powernet fabric as netting is clearly erroneous. It is Customs position that the fabric in question, which is a stretch knit with a "brickwork" or "honeycomb" construction containing elastic man-made fibers (not rubber) and a very small amount of open work is properly classifiable under the provision for knit fabrics, of man-made fibers, in item 345.50, TSUS. Accordingly, the proposal is adopted.

DRAFTING INFORMATION

The principal author of this document was Jesse V. Vitello, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: July 19, 1983.
ROBERT E. POWIS,
Acting Assistance Secretary of the Treasury.

[Published in the Federal Register, August 8, 1983 (48 FR 35878)]

(T.D. 83-161)

Foreign Currencies—Quarterly Rates of Exchange

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), for the information and use of Customs officers and other concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Quarterly beginning: July 1, 1983 through September 30, 1983.

Country	Name of currency	U.S. dollars
Australia	Dollar	.87620
Austria	Schilling	.055968
Belgium	Franc	.019662
Brazil	Cruzeiro	.001842
Canada	Dollar	.814996
China P.R	Renminbi Yuan	.502816
Denmark	Krone	.109379
Finland	Markka	.180685

Country	Name of currency	U.S. dollars
France	Franc	.130976
Germany	Deutsche Mark	.393499
Hong Kong	Dollar	.139860
India	Rupee	.099108
Iran	Rial	N/A
Ireland	Pound	1.2400
Italy	Lira	.000664
Japan	Yen	.004181
Malaysia	Dollar	.429000
Mexico	Peso	.006707
Netherlands	Guilder	.351432
New Zealand	Dollar	.65550
Norway	Krone	.137127
Philippines	Peso	.090498
Portugal	Escudo	.008547
Republic of So. Africa	Rand	.91500
Singapore	Dollar	.469263
Spain	Peseta	.006875
Sri-Lanka	Rupee	.043403
Sweden	Krona	.130976
Switzerland	Franc	.474834
Thailand	Baht (Tical)	.043497
United Kingdom	Pound	1.5310
Venezuela	Bolivar	.087719

(LIQ–03–01 S:C:I)

Dated: July 1, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83–162)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:
June 1–3, 1983 ..... $0.123747

Chile peso:	
June 1, 1983	$0.013072
June 2, 1983	.013072
June 3, 1983	.012953
Colombia peso:	
June 1, 1983	$0.012999
June 2, 1983	.012990
June 3, 1983	.012972
Greece drachma:	
June 1, 1983	$0.011834
June 2, 1983	.011848
June 3, 1983	.011869
Indonesia rupiah:	
June 1–2, 1983	$0.001030
June 3, 1983	.001029
Israel shekel:	
June 1, 1983	$0.022287
June 2–3, 1983	.022217
Peru sol:	
June 1, 1983	$0.000692
June 2, 1983	.000692
June 3, 1983	.000682
South Korea won:	
June 1, 1983	$0.001295
June 2–3, 1983	.001293

(LIQ-03-01 S:C:I)

Dated: June 24, 1983

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83-163)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:	
June 6–10, 1983	$0.123747
Chile peso:	
June 6–10, 1983	$0.012953
Colombia peso:	
June 6–9, 1983	$0.012972
June 10, 1983	.012908
Greece drachma:	
June 6, 1983	$0.011806
June 7, 1983	.011848
June 8, 1983	.011827
June 9, 1983	.011841
June 10, 1983	.011841
Indonesia rupiah:	
June 6–10, 1983	$0.001029
Israel shekel:	
June 6–7, 1983	$0.022075
June 8–9, 1983	.022070
June 10, 1983	.021959
Peru sol:	
June 6–9, 1983	$0.000682
June 10, 1983	.000660
South Korea won:	
June 6, 1983	$0.001293
June 7–8, 1983	.001291
June 9–10, 1983	.001289

(LIQ–03–01 S:C:I)

Dated: June 10, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83–164)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others con-

cerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:	
June 13–17, 1983	$0.123747
Chile peso:	
June 13–16, 1983	$0.012953
June 17, 1983	.012853
Colombia peso:	
June 13–16, 1983	$0.012908
June 17, 1983	.012842
Greece drachma:	
June 13, 1983	$0.011834
June 14, 1983	.011841
June 15, 1983	.011834
June 16–17, 1983	.011841
Indonesia rupiah:	
June 13–16, 1983	$0.001029
June 17, 1983	.001025
Israel shekel:	
June 13, 1983	$0.021786
June 14, 1983	.021678
June 15, 1983	.021683
June 16–17, 1983	.021603
Peru sol:	
June 13–16, 1983	$0.000660
June 17, 1983	.000649
South Korea won:	
June 13–15, 1983	$0.001289
June 16–17, 1983	.001287

(LIQ–03–01 S:C:I)

Dated: June 17, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83–165)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below.

The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:	
June 20–24, 1983	$0.123747
Chile peso:	
June 20–23, 1983	$0.012853
June 24, 1983	.012788
Colombia peso:	
June 20–23, 1983	$0.012842
June 24, 1983	.012943
Greece drachma:	
June 20, 1983	$0.011848
June 21, 1983	.011820
June 22, 1983	.011862
June 23, 1983	.011841
June 24, 1983	.011820
Indonesia rupiah:	
June 20–23, 1983	$0.001025
June 24, 1983	.001026
Israel shekel:	
June 20–21, 1983	$0.021473
June 22–24, 1983	.021340
Peru sol:	
June 20–23, 1983	$0.000649
June 24, 1983	.000639
South Korea won:	
June 20–24, 1983	$0.001287

(LIQ–03–01 S:C:I)

Dated: June 24, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83–166)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certi-

fied buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:	
June 27–30, 1983	$0.123747
Chile peso:	
June 27–30, 1983	$0.012788
Colombia peso:	
June 27–30, 1983	$0.012943
Greece drachma:	
June 27, 1983	$0.011848
June 28–29, 1983	.011813
June 30, 1983	.011820
Indonesia rupiah:	
June 27–28, 1983	$0.001026
June 29, 1983	.001025
June 30, 1983	.001026
Israel shekel:	
June 27–28, 1983	$0.021340
June 29–30, 1983	.021004
Peru sol:	
June 27–30, 1983	$0.000639
South Korea won:	
June 27–28, 1983	$0.001287
June 29–30, 1983	.001286

(LIQ–03–01 S:C:I)

Dated: June 30, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83–167)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to Section 522(C), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 83–90 for the following countries. Therefore, as to entries covering merchan-

dise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
June 3, 1983	$0.99060
Belgium franc:	
June 1, 1983	$0.019650
Brazil cruzeiro:	
June 1, 1983	$0.002026
June 2, 1983	.001982
June 3, 1983	.001982
Denmark krone:	
June 1, 1983	$0.109649
June 2, 1983	.109860
June 3, 1983	.109830
France franc:	
June 1, 1983	$0.130395
Hong Kong dollar:	
June 1, 1983	$0.138122
June 2, 1983	.137931
June 3, 1983	.137363
United Kingdom pound:	
June 1, 1983	$1.5900
June 2, 1983	1.5816
June 3, 1983	1.5650
Venezuela bolivar:	
June 1, 1983	$0.100000
June 2, 1983	.098039
June 3, 1983	.093458

(LIQ-03-01 S:C:I)

Dated: June 3, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T. D. 83-168)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to Section 522(C), Tariff Act of 1930, as amended

(31 U.S.C. 372(C)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 83-90 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
June 6, 1983	$0.055267
June 7, 1983	.055279
June 8, 1983	.055302
June 9, 1983	.055325
June 10, 1983	.055563
Belgium franc:	
June 6, 1983	$0.019508
June 7, 1983	.019497
June 8, 1983	.019493
June 9, 1983	.019489
June 10, 1983	.019554
Brazil cruzeiro:	
June 6-10, 1983	$0.001982
Denmark krone:	
June 6, 1983	$0.108873
June 7, 1983	.108903
June 8, 1983	.109230
June 9, 1983	.109194
June 10, 1983	.109529
France franc:	
June 6, 1983	$0.129584
June 7, 1983	.129601
June 8, 1983	.129450
June 9, 1983	.129618
June 10, 1983	.129955
Germany mark:	
June 6, 1983	$0.389864
June 7, 1983	.389332
June 8, 1983	.389454
June 9, 1983	.389864
June 10, 1983	.391236
Hong Kong dollar:	
June 6, 1983	$0.134048
June 7, 1983	.131234
June 8, 1983	.133869
June 9, 1983	.134590
June 10, 1983	.133869

Ireland pound:	
June 6–7, 1983	$1.2310
June 8, 1983	1.2290
June 9, 1983	1.2320
June 10, 1983	1.2360
Italy lire:	
June 6–8, 1983	$0.000657
Mexico peso:	
June 9, 1983	$0.006739
June 10, 1983	.006734
Netherland guilder:	
June 6–8, 1983	$0.347222
June 9, 1983	.347524
United Kingdom pound:	
June 6, 1983	$1.5760
June 7, 1983	1.5720
June 8, 1983	1.5696
June 9, 1983	1.5788
June 10, 1983	1.5705
Venezuela bolivar:	
June 6–9, 1983	$0.093458
June 10, 1983	.088496

(LIQ–03–01 S:C:I)

Dated: June 13, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83–169)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to Section 522(C), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 83–90 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
June 13, 1983	$0.055617

June 14, 1983	.055317
June 15, 1983	.055233
June 16, 1983	.055486
June 17, 1983	.055340
Belgium franc:	
June 13, 1983	$0.019643
June 14, 1983	.019524
June 15, 1983	.019531
June 16, 1983	.019639
June 17, 1983	.019623
Brazil cruzeiro:	
June 13–16, 1983	$0.001941
June 117, 1983	.001910
Denmark krone:	
June 13, 1983	$0.109709
June 14, 1983	.109290
June 15, 1983	.109081
June 16, 1983	.109619
June 17, 1983	.109218
France franc:	
June 13, 1983	$0.130124
June 14, 1983	.129601
June 15, 1983	.129601
June 16, 1983	.130310
June 17, 1983	.129828
Germany mark:	
June 14, 1983	$0.389864
June 15, 1983	.389484
June 16, 1983	.391313
June 17, 1983	.390854
Hong Kong dollar:	
June 13, 1983	$0.134771
June 14, 1983	.135318
June 15, 1983	.135135
June 16, 1983	.138313
June 17, 1983	.140164
Ireland pound:	
June 14, 1983	$1.2315
June 15, 1983	1.2318
June 16, 1983	1.2360
June 17, 1983	1.2320
Italy lira:	
June 15, 1983	$0.000657

Mexico peso:	
June 13, 1983	$0.006734
June 15–16, 1983	.006734
Portugal escudo:	
June 15, 1983	$0.009547
June 17, 1983	.009524
Spain peseta:	
June 15, 1983	$0.006931
United Kingdom pound:	
June 15, 1983	$1.5522
Venezuela bolivar:	
June 13–16, 1983	$0.088496
June 17, 1983	.088476

(LIQ–03–01 S:C:I)

Dated: June 17, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83–170)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to Section 522(C), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 83–90 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria shilling:	
June 20, 1983	$0.055556
June 21, 1983	.055641
Belgium franc:	
June 20, 1983	$0.019643
June 21, 1983	.019635
Brazil cruzeiro:	
June 20–22, 1983	$0.001910
June 23–24, 1983	.001884
Denmark krone:	
June 20, 1983	$0.109529

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June 21, 1983	.109439
June 24, 1983	.110072
France franc:	
June 21, 1983	$0.130412
Hong Kong dollar:	
June 20, 1983	$0.140164
June 21–22, 1983	.140449
June 23, 1983	.139276
June 24, 1983	.139665
Ireland pound:	
June 20, 1983	$1.2360
June 21, 1983	1.2350
Philippines peso:	
June 23–24, 1983	$0.090498
Portugal escudo:	
June 20, 1983	$0.009346
June 21, 1983	.009551
June 22, 1983	.008621
June 23–24, 1983	.008628
Spain peseta:	
June 21, 1983	$0.006936
Venezuela bolivar:	
June 20–23, 1983	$0.084746
June 24, 1983	.086957

(LIQ–03–01 S:C:I)

Dated: June 24, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83–171)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to Section 544(C), Tariff Act of 1930, as amended (31 USC 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 83–90 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Belgium franc:	
June 28, 1983	$0.019646
June 29, 1983	.019635
June 30, 1983	.019677
Brazil cruzeiro:	
June 27–29, 1983	$0.001884
June 30, 1983	.001842
Denmark krone:	
June 27, 1983	$0.109529
June 28, 1983	.109469
June 29, 1983	.106213
June 30, 1983	.109619
Hong Kong dollar:	
June 27, 1983	$0.139470
June 28, 1983	.139276
June 29, 1983	.138889
June 30, 1983	.139860
Philippines peso:	
June 27–28, 1983	$0.090498
June 29, 1983	.083682
June 30, 1983	.090498
Portugal escudo:	
June 27, 1983	$0.008632
June 28, 1983	.008518
June 29, 1983	.008554
June 30, 1983	.008547
Spain peseta:	
June 28, 1983	$0.006889
June 29, 1983	.006888
June 30, 1983	.006875
Venezuela bolivar:	
June 27–30, 1983	$0.086957

(LIQ–03–01 S:C:I)

Dated: June 30, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83-172)

Customhouse Broker License—Revocation

Revocation of Individual License No. 3837 Issued on June 21, 1973, for District 49-09, San Juan, Puerto Rico

Notice is hereby given that the Commissioner of Customs on pursuant to section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and section 111.53, Customs Regulations, as amended (19 CFR 111.53), revokes individual Customhouse Broker's License No. 3837 issued for Norma E. Sanchez on June 21, 1973, for District 49-09, San Juan, Puerto Rico.

The Commissioner's decision is effective as of August 1, 1983.

ALFRED R. DE ANGEULS,
Acting Commissioner of Customs.

[Published in the Federal Register, August 8, 1983 (48 FR 36052)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

Proposed Change in the Customs Service Field Organization

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to change the customs Service field organization by consolidating the Philadelphia and Chester, Pennsylvania, and Wilmington, Delaware, ports of entry into a single port of entry with headquarters in Philadelphia. The consolidated port area would include the geographical territory of the existing three ports. The change is being proposed to promote substantial savings to Customs in the use of its manpower, eliminate unnecessary travel, improve service, and reduce costs for the importing community.

DATES: Comments must be received on or before October 4, 1983.

ADDRESS: Comments (preferably in triplicate) may be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Richard C. Coleman, Office of Inspection, U.S. Customs Service, 1301, Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

Background

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, Customs proposes to amend section 101.3(b), Customs Regulations (19 CFR 101.3(b)), by consolidating the Philadelphia and Chester, Pennsylvania, and Wilmington, Delaware, ports of entry into a single port of entry with headquarters in Philadelphia. The consolidated port area would include the geographical territory of the existing three ports.

The proposed consolidation would permit much faster and more economical servicing of oil tankers in the lower Delaware Bay area by utilizing Customs personnel assigned to Dover Air Force Base, in Dover, Delaware, rather than sending personnel as much as 250 miles, roundtrip, from Philadelphia. Such travel is costing Customs from one-half to a full man day for every ship currently serviced at Big Stone Beach, which is six miles off Slaughter Beach, Delaware.

Another benefit for Customs is that reimbursable travel expenses would be reduced 75–80 percent while the Customs response time would be decreased from 4 hours to under 1 hour. Vessel entry activities would be reduced substantially for both vessel agents and the shipping industry. Vessel entrance and clearance would be facilitated for both vessel agents and their accounts at reduced costs.

The shipping community would also benefit from faster processing of their entries. By vessel it can take 12 hours to transit the Delaware River from the lower Delaware Bay to the Port of Philadelphia, and around 9 hours to go from the lower Delaware Bay to Wilmington and Chester. Importers of quota-class merchandise cannot present their entries to Customs until the vessel arrives within the port of entry. Consolidating the Delaware River and lower Delaware Bay into one port of entry will permit importers to present their entries to Customs as soon as the vessel enters the lower Delaware Bay.

If the proposed change is adopted, the list of Customs regions, districts, and ports of entry in section 101.3(b), Customs Regulations, will be amended accordingly.

The limits of the proposed consolidated port of Philadelphia would be the geographical territory of the existing three ports of Philadelphia and Chester, Pennsylvania, and Wilmington, Delaware. The geographical limits of the proposed consolidated port of Philadelphia would be as follows:

The ports of Philadelphia, Pennsylvania (comprising the territory within the corporate limits of Philadelphia, Pennsylvania, Camden and Gloucester City, New Jersey, the territory within the limits of the Boroughs of Brooklawn, National Park, and Paulsboro, and the Townships of West Deptford and Greenwich, all in the State of New Jersey, the Borough of Folcroft and the Townships of Darby and Tinicum, all in the State of Pennsylvania, and the territory between the Delaware River and U.S. Highway No. 13, in Bucks County, State of Pennsylvania, from the corporate limits of Philadelphia to and including Morrisville, Pennsylvania, and the territory between the Delaware River and U.S. Highway No. 130 and U.S. Highway No. 206, in Camden, Burlington, and Mercer Counties, State of New Jersey, from the corporate limits of Camden, New Jersey, to and including Trenton, New Jersey), Chester, Pennsylvania (comprising the territory within the corporate limits of Chester, Pennsylvania, the territory within the limits of the Boroughs of Marcus Hook, Trainer, Upland, Parkside, Eddystone, and

the Townships of Lower Chichester and Ridley, all in the State of Pennsylvania, and the territory extending along the Pennsylvania side of the Delaware River from Darby Creek to the Delaware State line, a distance of approximately 10 miles), and Wilmington, Delaware (comprising the territory within the corporate limits of Wilmington, Delaware, the territory within the limits of New Castle, Newport, and Claymont, all in the State of Delaware, and the territory within the limits of Carneys Point and Deep Water Point, all in the State of New Jersey, and the territory lying between U.S. Highway No. 13 and the Delaware River, from the corporate limits of Wilmington to the Chesapeake and Delaware Canal, all in the State of Delaware).

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

AUTHORITY

This change is proposed under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2) and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp. Ch. II) and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

LIST OF SUBJECTS

Customs duties and inspection, imports, organization.

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this proposal. Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-related activity in various parts of the country. Although this change may have a limited effect upon some small entities in the Philadelphia and Chester, Pennsylvania, and Wilmington, Delaware, areas, it is not expected to be significant because the extension of the limits of Customs ports of entry in other locations has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Regulatory Flexibility Act. According-

ly, it is certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the amendment, if adopted, will not have a significant economic impact on a substantial number of small entities.

Drafting Information

The principal author of this document was James S. Demb, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Donald F. Kelly,
Acting Commissioner of Customs.

Approved: July 19, 1983.
Robert E. Powis,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, August 5, 1983 (48 FR 35666)]

Recent Unpublished Customs Service Decisions

The following listing of recent administrative decisions issued by the U.S. Customs Service is published for the information of Customs officers and the importing community. Although the decisions are not of sufficient general interest to warrant publication as Customs Service Decisions, the listing describes the issues involved and is intended to aid Customs officers and concerned members of the public in identifying matters of interest which recently have been considered by the U.S. Customs Service. Individuals to whom any of these decisions would be of interest should read the limitations expressed in 19 CFR 177.9(c).

A copy of any decision included in this listing, identified by its date and file number, may be obtained through use of the microfiche facilities in Customs reading rooms or if not available through those reading rooms, then it may be obtained upon written request to the Office of Regulations and Rulings, Attention: Legal Retrieval and Dissemination Branch, Room 2404, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Copies obtained from the Legal Retrieval and Dissemination Branch will be made available at a cost to the requester of $0.15 per page.

The microfiche referred to above contains rulings/decisions published or listed in the CUSTOMS BULLETIN, many rulings predating the establishment of the microfiche system, and other ruling/decisions issued by the Office of Regulation and Rulings. This microfiche is available at a cost of $0.15 per sheet of fiche. In addition, a keyword index fiche is available at the same cost ($0.15) per sheet of fiche.

It is anticipated that additions to both sets of microfiche will be made quarterly. Requests for subscriptions for the microfiche should be directed to the Legal Retrieval and Dissemination Branch. Subscribers will automatically receive updates as they are issued and will be billed accordingly.

Dated: August 1, 1983.

B. JAMES FRITZ,
Director, Regulations Control
and Disclosure Law Division.

Date of decision	File No.	Issue
7-12-83	071126	Classification: large aircraft structure ultrasonic inspection machine (TSUS 712.49)
7-11-83	071195	Classification: roofing paper in rolls and roofing shingles made from that paper, produced on a fiberglass base (TSUS 540.71, 523.91, 523.94)
6-20-83	071362	Classification: applicability of GSP to toy figures made in Hong Kong and painted in Mainland China
7-19-83	106054	Vessels: the diversion to U.S. ports of empty containers which were originally intended to be transported to foreign ports (19 CFR 4.93)
7-13-83	106089	Vessels: operations of foreign-built vessels carrying offshore fishing parties for hire prohibited by coastwise laws (TD 55193(2)); request for waiver by U.S. Army denied
7-13-83	106180	Vessels: a foreign-built deep densification barge which compacts the seabed by the use of vibrator tubes does not violate 46 U.S.C 292 when used in the U.S.
7-18-83	106187	Vessels: permanent employees of an international organization who are not citizens must comply with appropriate navigation laws with their foreign-flag yacht that is not entitled to a cruising license (46 U.S.C. 104, 46 U.S.C. 65b)
7-20-83	106222	Vessels: the strengthening of hatch covers and installation of an electrical distribution system to increase cargo capacity and refrigeration capacity of a vessel are modifications to hull and fittings and are not dutiable under 19 U.S.C. 1466
6-1-83	543064	Value: a pattern made abroad from a prototype garment made in the U.S. and the pattern making function are not necessary for the production of the imported merchandise, in the instant case, therefore are not dutiable as assists under the TAA

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 82-32)

BALLY/MIDWAY MFG. CO., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE

(Decided; August 2, 1983)

Paul Plaia, Jr., of Washington, D.C., argued for appellant. With him on the brief was *Cecilia H. Gonzalez.*

Donald L. Welsh and *Sidney Katz*, of Chicago, Illinois, were on the brief for appellant.

Joel R. Junker, of Washington, D.C., argued for appellee. With him on the brief was *Michael H. Stein.*

George H. Gerstman, of Chicago, Illinois, was on the brief for The Amusement Game Manufacturer's Association, *Amicus Curiae.*

Before FRIEDMAN, NICHOLS, and BENNETT, *Circuit Judges.*

FRIEDMAN, *Circuit Judge: This is an appeal from a determination of the U.S. International Trade Commission ("the Commission") that the importation of copies of a particular video game that infringed the appellant's copyright and trademark covering the game did not violate section 337(a) of the Tariff Act of 1930, 19 U.S.C. § 1337(a) (1976). The ground of the Commission's decision was that the practice involved—the importation of the infringing games—did not, as the statute requires, have an "effect or tendency" to "destroy or substantially injure an industry * * * in the United States." We reverse.*

I

A. This case grows out of an attempt by the appellant to exclude from the United States foreign-made copies of video games it manufactures and sells in the United States. Video games are a relatively new, but widespread phenomenon in this country. The popularity of the games has resulted in a number of companies which devote substantial resources to the development, production, and sales of this product.

The games generally consist of cabinetry containing electronic circuitry and a television picture tube which serves as a screen on which the visual images of the game are shown. The major component of each game is a printed circuit board which houses the elec-

tronic circuitry that generates the images and sounds of the game; the circuit board can be sold separately from the rest of the game.

Unlike most other products, a particular video game generally has only a brief period of popularity, accompanied by high production and sales. As new video games enter the market, the old games decline in popularity, and production and sales decrease. This pattern of production and sales is reinforced by the fact that there are only a limited number of sites for video games (*i.e.,* in arcades), and most arcades will purchase only a few of each game. Thus, there is continual pressure on video game manufacturers to develop new games, and sell as many of each game as possible during its short life-span.

The two games involved in this case, Pac-Man and Rally-X were developed by Namco Limited of Japan in 1980. In the same year, Namco assigned all of its United States rights to the games, including all related copyrights and trademarks, exclusively to Bally, in return for advance payments and royalties. Specifically, Namco authorized Bally to produce, distribute, and service Rally-X and Pac-Man in the United States.

B. 1. On April 17, 1981, Bally filed with the Commission a complaint alleging that 35 companies violated section 337(a) by importing video games that infringe Bally's copyrights and common law trademarks on Rally-X and Pac-Man.

The Commission initiated an investigation in the case on July 1, 1981, and subsequently named 50 respondents. The Commission found that most of the respondents (both foreign and domestic) were in default for failure to respond to the complaint, participate in discovery, or appear in the Commission proceedings. Only a few of the respondents participated in the proceedings at all, and only one of them appeared at the hearing.

A lengthy hearing was held before an administrative law judge, in which substantial testimony was taken and numerous exhibits and depositions were admitted into evidence. The administrative law judge issued a recommended decision in which he concluded that the importation of Pac-Man, but not the importation of Rally-X, had violated section 337(a). After additional hearings, the commission adopted these recommendations. *See In re Certain Coin-Operated Audiovisual Games and Components Thereof,* U.S. Int'l Trade Comm'n Publ. No 1267 (July 1982).

2. The Commission found that Bally's copyrights on "audiovisual works" in the Pac-Man and Rally-X games (*i.e.,* the mazes, characters, and other graphic works appearing on the screen in the games and the accompanying sound effects) were valid, and were infringed by respondents' video games that copied these audiovisual works. The Commission also found that Bally had common-law trademark rights to the names "Pac-Man" and "Rally-X," and that these rights were infringed by the use of similar names on the respondents' games.

The Commission accepted the administrative law judge's "traditional definition" of the domestic industry as "that portion of complainant's business devoted to the exploitation of the intellectual property rights in issue," and agreed with his application of this definition "only to those facilities making and selling *games* under the Pac-Man and Rally-X copyrights and trademarks." (Emphasis in original.)

The Commission found that under this standard "there is an industry currently involved in the production, distribution and sale" of the Pac-Man game, and that the industry was efficiently operated. The "Pac-Man industry has enjoyed considerable success * * *" and "it is expected that Pac-Man's market life will continue, at least through the end of 1982, and possibly longer."

The Commission then found that the "unfair acts alleged have the effect or tendency of substantially injuring the domestic Pac-Man industry." It stated that Bally "has lost * * * [a number of] Pac-Man sales" to infringing imports sold in the United States, which were virtually indentical to the Pac-Man game. It also indicated that the substantial percentage by which the prices of the infringing imports are lower than Bally's prices for Pac-Man "is strong evidence of a tendency to substantially injure the domestic industry."

The Commission concluded that the importation of video games that infringed Bally's trademark and copyright on Pac-Man violated section 337(a). The Commission entered an order under section 337(d) excluding from entry into the United States "[c]oin-operated audiovisual games and components thereof which infringe complainant's Pac-Man copyrights and/or trademark" except where "such importation is licensed by the copyright and/or trademark owner."

3. With respect to Rally-X, the Commission concluded that no domestic industry existed. It stated that Bally's inventory of Rally-X games is low, that "[c]urrently, there are no facilities being used to produce an article competitive with the imported Rally-X games[,]" and that the "[c]omplainant is no longer actively engaged in distribution or sale of Rally-X games." Based on the administrative law judge's findings, the Commission concluded that "the popularity of the Rally-X game is in a state of permanent decline[,]" and that "[t]here is nothing in the record to indicate that complainant will resume the manufacture and marketing of the games even if the Commission were to find a violation of section 337 and issue a general exclusion order * * *."

The Commission also agreed with the administrative law judge that if a Rally-X industry did exist, it was "efficiently and economically operated."

The Commission also found that, if a Rally-X industry existed, it was not injured by the infringing imports. The Commission stated

that "[t]here is no evidence in the record that the decline in sales of Rally-X games is due to import competition, or that, in absence of import competition, domestic production of the Rally-X game would have continued." The Commission agreed with the finding of the administrative law judge that "the popularity of the Rally-X game is in a state of permanent decline which is characteristic of such games."

II

Section 337 (a) makes unlawful

> [u]nfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale * * *, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry * * *.

As noted, the Commission defined the domestic "industry" in this case as the facilities of Bally that produced and sold the Rally-X game. The parties generally do not question that definition, and we accept it as the basis for deciding this case.

Although, the Commission discussed the case in terms of the status and effect of the importations upon the Rally-X "industry," as the statute requires, a more realistic analysis must recognize that the actual focus of the inquiry was upon a particular and relatively narrow segment of Bally's business, namely, the production of Rally-X games. The correctness of the Commission's two critical rulings in this case—that there was no domestic Rally-X industry and that, if there were one, it had not been injured by the importation of the infringing video games—must be determined in the light of the actual business operations that the Commission was endeavoring to protect from unfair competition in applying section 337.

A. 1. The Commission based its determination that there was no Rally-X industry on the market conditions that existed when it decided the case. We conclude, however, that in the circumstances of this case the proper date for determining whether Bally's Rally-X game constituted an "industry" entitled to protection under section 337 was the date on which the complaint was filed rather than the date on which the Commission rendered its decision.

a. Section 337(a) prohibits unfair practices "the effect or tendency of which is to destroy or substantially injure" a domestic industry. Under the Commission's theory, if there is an existing industry when the complaint is filed, but it is destroyed by the unfair practices during the Commission proceedings, there has been no violation of section 337(a). The effect of the Commission's position, if adopted, would be to vitiate the statutory proscription of unfair

practices "the effect * * * of which is to destroy * * *" a domestic industry.

The Commission's interpretation of section 337(a) also produces anomalous results. If the effect of the unfair practices has been to injure seriously the affected business during the administrative proceeding—for example, if the infringing imports captured half of the complainant's business—the importation would violate section 337(a). If, however, the infringers were so effective that they succeeded in capturing all of complainant's business and therefore destroyed relevant "industry," then there would be no violation under the Commission's theory. The result would be that the infringing importers whose unfair practices were most effective, i.e., those who succeeded in destroying their American competition, would be treated more favorably than those whose unfair practices were less successful. It is more likely that Congress, which enacted section 337 to "prevent every type and form of unfair practice" and to provide "a more adequate protection to American industry than any antidumping statute the county has ever had[,]" intended the statute to have such a bizarre effect. Sen. Comm. on Finance, S. Rep. No. 595, 67th Cong., 2d Sess. 3 (1922) (accompanying Tariff Act of 1922).

The anomaly of the Commission's interpretation of the statute is expecially disturbing in the case of the video game business. As indicated, the nature of the product and its distribution mean that most individual games have extremely limited lives, and that even the most successful games are on the market for a relatively brief time. In many instances, it seems likely that infringing imports will destroy or virtually eliminate the market for a particular domestically manufactured game before the Commission could complete its administrative proceedings.

In this very case, for example, the unfair practices directed against Rally-X were identical to those directed against Pac-Man. The reason the Commission protected Pac-Man from further injury by an exclusion order was that the Pac-Man infringing imports had not been a successful in injuring Bally's Pac-Man business as the infringing Rally-X game had been in injuring Bally's Rally-X game. Bally's Rally-X game, however, is just as entitled to protection under the statute as the more successful and apparently economically stronger Pac-Man game.

There is additional support for our conclusion in the statute itself. Section 337(a) prohibits not only unfair practices, the effect or tendency of which is to destroy or substantially injure a domestic industry, but also those that do or may "prevent the establishment of such an industry * * *." Since Congress barred unfair practices that prevent the establishment of a domestic industry, it is hard to believe that it did not also intend to prohibit unfair practices that were so effective that they destroyed an existing industry before an administrative proceeding under section 337 could be completed. Indeed, one would think that Congress would be more

concerned with protecting an existing business from rapid destruction by imports than with protecting a business that had not yet come into existence. Under the Commission's theory, however, the non-existent business would receive greater protection than the existing one destroyed by import competition during the pendency of the case.

In sum, if there was an existing domestic Rally-X "video game industry" when the complaint was filed, section 337(a) was satisfied.

b. In its brief, the Commission argues that the remedies it may provide under section 337, namely, exclusion and cease and desist orders, are "prospective in nature, applying only to future conduct or activities[,]" and that "[t]he statute does not provide for recovery for past damages suffered." The Commission apparently contends that because it probably would not have entered a remedial order against the infringing Rally-X games even if it found a violation, that fact precluded a finding of violation.

The Commission's conclusion does not follow from its premises, however. The statutory scheme bifurcates the violation and remedy phases of a case. Section 337(c) first directs the Commission to determine "whether or not there is a violation * * *." If the Commission determines that "there is [a] violation," section 337(d) directs the agency then to consider the question of remedy to deal with the violation found.

In making the remedy determination, section 337(d) requires the Commission to consider "the effect of [the] exclusion [of imports] upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers * * *." The Commission thus is required to consider a different and broader range of issues in deciding the remedy question than in deciding whether there is a violation. Furthermore, unlike the violation determination, an exclusion or cease and desist order of the Commission is not effective unless and until the President has approved it. 19 U.S.C. § 1337(g).

The Commission itself has recognized that the issues of violation and remedy are separate, and that it should determine the question of violation even though it might not issue any remedy if it finds a violation. In *In re Certain Automatic Crankpin Grinders,* 205 USPQ 71 (1979), the Commission first held that the importation into and sale in the United States of foreign products that infringed United States patents violated section 337 because the effect or tendency was to destroy or substantially injure a domestic industry. It then concluded, however, that in the circumstances of the case, "the public interest considerations * * * are stronger than complainant's rights to enforcement of its patent monopoly through a remedy pursuant to section 337. Accordingly, we are pro-

viding no remedy for the violation of section 337, which we have found to exist." 205 USPQ at 80.

In sum, Congress did not intend the Commission to consider questions of remedy when the agency determines whether there is a violation.

2. The record shows that when Bally filed a complaint with the Commission in April 1981, its Rally-X business constituted an existing "industry" under section 337(a).

Bally manufactured and sold a substantial number of Rally-X games during the first half of 1981. (Since the Commission treated production and sales figures as "confidential business information" that it placed under a protective order, and since we authorized the portions of the record containing those data to be submitted *in camera,* we do not state in this opinion the actual figures.) Bally continued this business until late 1981, although "production and sales * * * decreased" from March through November of that year. Bally apparently had ceased production and most sales of the game by late 1981, and few games were left in inventory at that time.

Although Bally's Rally-X business was small in comparison with its Pac-Man business, this comparison is misleading in determining whether the Rally-X business was an existing "industry" when the complaint was filed. The administrative law judge noted that Pac-Man "has demonstrated a viability and popularity in the market that is somewhat exceptional compared to other * * * games." Moreover, "[t]here is nothing in the statute which requires that an industry must be of any particular size * * *." *In re Von Clemm,* 229 F.2d 441, 444, 108 USPQ 371, 373 (CCPA 1955).

Since most individual games in the video game business have only a short life (see *supra,* page 2), it is immaterial that Rally-X was in this category. If the fact that Rally-X was short-lived was dispositive or even significant in determining the existence of an industry under section 337(a), it would be a rare video game that would be entitled to the protection of that section. There is nothing in the statute that indicates or even suggests that Congress did not intend relatively short-lived American video games to receive the same protection against copyright and trademark infringement by imported competing products that other domestic businesses enjoy.

Bally's Rally-X business thus constituted a domestic industry under section 337(a) at the time the complaint was filed. The deterioration of that business during the Commission proceedings does not undermine that conclusion.

B. The Commission also erred in its alternative ground for dismissing the complaint with respect to Rally-X: that even if there were a Rally-X industry, it had not been injured by the infringing imports.

1. The number of infringing Rally-X games sold in the United States was significant. Several respondents who entered into consent decrees indicated that they either imported and sold infring-

ing games or that they purchased them. Bally's distributors have complained to Bally about a number of other infringing sales, and video game operators have told Bally of "copy games" they have seen in their particular areas. Customs officials testified that infringing Rally-X games have and were (and are still) entering the United States, and that their number "has recently increased."

Since there is no indication that the infringing games were purchased in substitution for some other game rather than in substitution for Bally's Rally-X game, the inference is inescapable that every sale of an infringing Rally-X game resulted in a lost scale of that game by Bally. Indeed, in the case of Pac-Man, the Commission based its finding of injury on the fact that the sales of infringing games represented a loss of sales by Bally. There is no basis to believe that the effect of the infringing imports of Rally-X on Bally's Rally-X business was any different from the effect of infringing imports on its Pac-Man business.

In discussing the injurious effect of the infringing imports upon Bally's Pac-Man business, the administrative law judge stated that "[i]f all named respondents had participated in discovery, additional lost sales would have been established for the record," and that this conclusion "is buttressed by evidence which indicates that the importation of video games [including Pac-Man Rally-X] has recently increased." Based on these findings, the Commission drew an inference in favor of Bally that the number of lost Pac-Man sales indicated by the record is "an underestimation" because of "the multiplicity of defaulting respondents and the popularity of the game * * *." There is no reason why a similar inference should not be drawn in the case of the Rally-X games.

Although the number of infringing imports was not a high percentage of Bally's total sales of the Rally-X game, it was enough to establish injury to a domestic industry under section 337(a). That section prohibits not only unfair acts, the effect of which is to "destroy or substantially injure" a domestic industry, but also such acts that have a "tendency" to do so. The sales of infringing Rally-X games were approximately the same percentage of Bally's total sales of those games as the sales of the infringing Pac-Man games were of Bally's total sales of Pac-Man. The Commission held that the loss of that percentage of Bally's Pac-Man business to the infringing imports established that those imports created a tendency to injure, in violation of section 337(a). There is no basis for a different conclusion with respect to the comparable sales of the infringing Rally-X games.

Where the unfair practice is the importation of products that infringe a domestic industry's copyright, trademark, or patent right, even a relatively small loss of sales may establish, under section 337(a), the requisite injury to the portion of the complainant's business devoted to the exploitation of those intellectual property

rights. In discussing the application of section 337 to unfair competition involving patent infringement, Congress stated: "Where unfair methods and acts have resulted in conceivable losses of sales, a tendency to substantially injure such industry has been established." *See* House Comm. on Ways and Means, TRADE REFORM ACT OF 1973, H.R. Rep. No. 571, 93d Cong., 1st Sess. 78 (1973). *Accord, Von Clemm,* 229 F.2d at 445, 108 USPQ at 374. As the administrative law judge explained with respect to Pac-Man, "[t]he pirating of these games * * * can only have an adverse effect on competition in the development and manufacture of video games [under trademarks and copyrights]. There will be little incentive for video game manufacturers to devote the months or years necessary to develop a new video game if the result of their ingenuity and workmanship can be stolen so easily and the resultant product can be instantaneously undersold by pirated copies."

Accordingly, the sales of Rally-X that Bally lost to the infringing imports established the requisite injury to the Rally-X industry under section 337(a).

Other indicia of injury, which the Commission relied on to show that the domestic Pac-Man industry suffered injury, are also present here. *Cf. Astra-Sjuco, A.B.* v. *U.S. Int'l Trade Comm'n,* 629 F.2d 682, 690, 207 USPQ 1, 8 (CCPA 1980) (applying similar criteria of injury). The record shows that foreign importers have sent numerous solicitations to potential United States purchasers of Rally-X that advertise infringing games, and that these solicitations continued during the hearings. Additionally, the foreign markets for the sale of Rally-X games (particularly Japan) are saturated and, as a consequence, foreign manufacturers of infringing games (mostly Japanese companies) have a large surplus inventory to sell in the United States at low prices and a substantial capacity to produce additional games. The continuing solicitations, coupled with the surplus inventory and capacity to make Rally-X games, strongly suggest that the foreign companies intend to continue sales of infringing imports where they can.

2. The Commission found, however, that the decline in Bally's sales of the Rally-X game resulted not from the infringing imports but from the drop in popularity of the game itself. It concluded from this fact that the unfair practices were not the cause of the injury that Bally suffered during the period of the imports.

As discussed above, the record shows that a significant number of the infringing Rally-X games, which were virtually identical to Bally's game, were imported into and sold in the United States.

The administrative law judge also found that "[p]rice is a major consideration for the purchasers of video games," and that "[t]here is a significant price differential between [the] infringing imported games and complainant's games." He further found that "[t]he locations where video games can be placed are limited," that "when

there is an opening at a location, usually only one game can be placed there." Therefore, "[w]hen a sale is lost at a particular location, that sale cannot be subsequently recovered." These findings related to the video game industry generally, not just to Pac-Man.

This evidence demonstrates that Bally's Rally-X games and the infringing imports are virtually identical, that the infringing imports were significantly cheaper than Bally's product, and that the market for Rally-X games necessarily is limited. In these respects, the situation of Rally-X cannot be distinguished from that of Pac-Man. It was on the basis of virtually identical facts that the Commission concluded that the infringing imports injured the Pac-Man industry. These facts also require a finding of injury to the Rally-X industry.

The evidence the Commission relied on to find that infringing imports were not the cause of injury to the Rally-X industry indicates that Rally-X sales declined in 1981, that Rally-X is a less popular game than Pac-Man and several other games, and that perhaps Bally lost some Rally-X sales because of the presence of these other games. This evidence is not inconsistent with, and therefore does not refute the other evidence in the record showing that the infringing imports injured Bally's Rally-X business, however. Indeed, the Commission accepted this conclusion in the case of Pac-Man, since it found injury to that industry because of lost sales and other instances of injury (described above) even though "the pace of [Bally's] sales [of Pac-Man] had slowed somewhat," which might suggest a lessening of popularity of that game also.

This case, therefore, is not one in which the agency decision was dependent on selecting between two sets of conflicting evidence. Rather, it is one where uncontradicted evidence established injury to Bally's Rally-X business, and other evidence—not in conflict—indicates that other factors resulted in Bally's loss of additional Rally-X sales. The Commission thus cannot defend its decision on the injury issue, as it seeks to do, on the theory that since the evidence on injury was conflicting, the agency acted within its discretion in accepting one rather than the other body of evidence.

CONCLUSION

The determination of the U.S. International Trade Commission that there has been no injury to the domestic Rally-X industry is reversed. The case is remanded to the Commission for further proceedings on the relief aspect of this case, consistent with this opinion.

REVERSED AND REMANDED

(Appeal No. 82-32)

BALLY-MIDWAY MFG. CO., APPELLANT *v.* UNITED STATES TRADE COMMISSION and ARTIC INTERNATIONNAL, INC., ET AL., APPELLEES

NICHOLS, *Circuit Judge,* concurring.

I join in Judge Friedman's clear and able opinion, but I would go further.

The record here reflects little short of total breakdown of the laws respecting unfair practices in import trade, *e.g.,* 19 U.S.C. § 1337, at least as applied to video games. Counsel in oral argument also characterized 19 U.S.C. § 1526 as ineffective so far as they were concerned.

It is evident that a breakdown of law enforcement inflicts injury far beyond the immediate victim. If persons are lawlessly gunned down on the public streets, and the state makes no effective response, those far removed from the scene acquire hand guns for personal protection, with all the dangers incident. They stay off all streets at night, and some at any time, to the point they are virtually prisoners in their own homes. The prosperity of legitimate business is destroyed, real estate values tumble, and jobs vanish from the employment market, except perhaps jobs as private guards, which proliferate. Eventually, if things go far enough, all will adhere to some mafia, or other extra-legal government, hoping it will avenge their death, and being, unlike the state, perfectly willing to do so, may even deter that event from happening. These are the reasons why murder is not, as it once was, a merely private wrong, to be avenged by the family of the victim only.

Something parallel, if less dramatic, occurs if the state creates patent and trademark rights and fails to enforce them, though they are important to the state and not to the patent and trademark holder only. If, however, the original producing infringer is outside the United States, the burden of enforcement falls on different shoulders. By § 1337, the ITC is here the chief of police, and the officers of the customs are the patrolmen on the beat, doing what they are told.

The treatment of "injury" to a domestic industry as abated if the domestic industry dies during the course of the ITC proceeding, impresses me as one of the evasions law enforcement officers are prone to when the task appears too formidable. I heartily join in the court's condemnation of it. But, to me, the weird definition of

"domestic industry" is likewise an evasion. To me it is obvious there is one industry: all the law-abiding domestic producers of video games. Is there a new industry every time an Italian designer comes out with a new design of women's shoes, or is there a shoe industry? A public and obvious demonstration that the protective laws are ineffectual induces capital to be withdrawn from the industry to some safer use, and prevents new video games from being conceived, manufactured, and marketed in a lawful way. Is this not the injury the Congress enacted § 1337 to prevent? If not, what was it?

It is not, however, my intent to pronounce dicta on the infinite variety of future cases that may come before the court. The congressional purpose is best served by flexibility. It may make a difference in what context "injury" is used which may include dumping and countervailing duty cases. "Injury" may at times be narrowly focused and it would frustrate Congress to look at a broad industry that may remain healthy. In the *Von Clemm* case, cited by the panel, it is made clear the statute therefore does not require the "industry" be of any particular size nor does it specify whether the "industry" is one company or several. Here we have not just one company, but one product of one company singled out as the whole "industry." Obviously the language that defines "injury" as including "or to prevent the establishment of such an industry" is deprived of all meaning if limited to preventing establishment of another "industry" to produce the Rally-X game. We might be safe in assuming that the supposititious founder of a new "industry" always would seek to differentiate his product in some fashion and it seems to me going too far to suppose that by effectuating such a policy he would take himself outside the statute. Such an interpretation makes the statute a disincentive to resourcefulness.

United States Court of International Trade

Decisions of the United States Court of International Trade

(Slip Op. 83-74)

ALSTHOM ATLANTIQUE and COGENEL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, WESTINGHOUSE ELECTRIC CORPORATION, DEFENDANT-INTERVENOR

Court No. 82-4-00474

Before RAO, *Judge.*

Memorandum Decision and Order

(Dated July 21, 1983)

Donohue and Donohue (John M.Peterson on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division (*A. David Lafer* on the brief) for the defendant.

Steptoe & Johnson (Valerie Amy Slater on the brief) for the intervenor.

RAO, *Judge:* Plaintiffs, Alsthom Atlantique and Cogenel, Inc., have moved for an order, pursuant to C.I.T. Rule 56.1, that the above-entitled action be submitted for determination by a motion for review of the administrative determination on the agency records and asks that the defendants be required to serve and file their responses to plaintiffs' motion papers and brief no later than 30 days following the service and filing of plaintiffs' motion papers and brief, *inter alia.*

The United States, defendant, has asked the court to allow it 60 days to respond to plaintiffs' motion, which will be dispositive of the issues involved in this action. It indicates that it will not be able to prepare a complete response to the motion and brief in the 30 days provided for in Rule 56.1(b) of this court.

Westinghouse Electric Corporation, Intervenor, also opposes the briefing schedule proposed by the plaintiffs, and also requests 60 days to respond to the motion. It reiterates the reasons set forth by the defendant, United States.

The language of Rule 56.1(b) is mandatory in that it provides that a response shall be made within 30 days after service of the motion for review on the basis of the record made before the agency. We note however, that pursuant to Rule 6(b) the court may, on motion, extend the period of time for an act required by the rules for good cause shown. The defendant and the intervenor are anticipating that they will not be able to respond to the motion and the supporting briefs. We believe that these positions are inappropriate and not well taken at this time. Should the defendant and the intervenor, after they have been served with plaintiffs' motion and brief, find that they can not, for good cause, respond within the time prescribed by Rule 56.1, they can then move for an extension of time within which to respond.

Plaintiffs take the position that the defendant's and intervenor's oppositions to their motion constitute a cross-motion for an extension of time and for leave to file reply briefs. Neither the United States nor Westinghouse in their responses request or refer to reply or sur-reply briefs, although the proposed orders submitted to the court provide for them. It is the opinion of this court that these do not constitute cross-motions for leave to file sur-reply briefs and the court does not decide whether such briefs are proper, necessary or appropriate in this action. It is therefore,

ORDERED, that plaintiffs' motion be granted; and that this action shall be submitted for determination as prescribed by Rule 56.1; and it is further

ORDERED, that plaintiffs serve and file their motion papers and brief no later than 20 days after the date of this Order; and it is further

ORDERED, that defendants serve and file their responses to plaintiffs' motion papers and brief no later than 30 days following service and filing of plaintiffs' motion papers and brief; and it is further

ORDERED, that plaintiffs serve their reply brief within 10 days after service and filing of defendants' response.

(Slip Op. 83–75)

PPG INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-9-01273

Before RAO, *Judge.*

On Plaintiff's Motion for Review Upon Agency Record, Defendant's Motion for Partial Summary Judgment and Cross-Motion for Remand and Plaintiff's Response to Defendant's Cross-Motion for Remand

[Defendant's cross-motion for remand granted.]

(Dated July 21, 1983)

Eugene L. Stewart (Terence P. Stewart, Jeffrey S. Beckington and *Roger Yochelson* with him on the briefs) for the plaintiff.

J. Paul McGrath, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Justice Department *(Sheila N. Ziff* on the brief) for the defendant.

RAO, Judge: This civil action was brought by plaintiff, an American manufacturer of clear sheet glass, to contest the final determination by the United States Commerce Department (Commerce) in its first annual review of a dumping finding with respect to clear sheet glass from Taiwan.

The original dumping finding had been made and published in 1971 by the United States Treasury Department (Treasury) which administered the antidumping laws of this country prior to the issuance of Executive Order No. 12188, January 2, 1980 (45 Fed. Reg. 993) which transferred this function from Treasury to Commerce. In its first annual review, Commerce concluded that there had been no shipments of clear sheet glass from Taiwan to the United States during the period coverd by the review (July 1, 1979 through July 31, 1980). As a result, Commerce used the weighted average margins from Treasury's master list covering the period July 1, 1974 through June 30, 1976, without further investigation.

The original investigation had concerned two manufacturers or exporters of clear sheet glass to the United States: Hsinchu Glass Works, Inc. (Hsinchu) and Taiwan Glass Corporation (Taiwan Glass). Taiwan Glass ceased its exportation of the merchandise to the United States in 1976. Hsinchu made two shipments of clear sheet glass to the United States in September 1979. These shipments were not considered by Commerce in its annual review and Commerce published its final results of the administrative review on the basis of the master lists from Treasury.

Commerce concedes that it should have considered to two shipments of clear sheet glass from Taiwan in September 1979 in deciding what constituted the best information available to it as the basis for its determination of the dumping margins (See 19 U.S.C 1677) and asks that the matter be remanded so that it may revise its calculations, if necessary, and issue a redetermination.

Plaintiff agrees that the matter should be remanded and asks the court to direct Commerce with respect to the reconsideration as to the following procedural concerns:

(1) That the correct period of review be designated by the Court to be July 1, 1976 through July 30, 1980

(2) That Hsinchu be required to report all its exports of clear sheet glass to the United States for that period to the extent that it has not done so previously

(3) That this court direct Commerce to base its determination on the actual shipments reported by Hsinchu for the revised period of review, and

(4) That the plaintiff be permitted to participate in the remand proceedings through disclosure of confidential information, a disclosure conference and a hearing. Plaintiff also seeks an opportunity to amend its complaint if necessary within thirty days from the date of the redetermination.

This court cannot give plaintiff access to confidential information in a remand of a first annual review of a dumping finding. Section 751(2) of the Trade Agreements Act of 1979 expressly prohibits the administering authority from revealing confidential information in an annual review and we cannot enlarge plaintiff's rights of disclosure beyond the congressional grant. However, plaintiff will be granted participation in a hearing if it requests one of Commerce under section 751(d)

> (d) Hearings.—Whenever the administering authority or the Commission conducts a review under this section it shall, upon the request of any interested party, hold a hearing in accordance with section 774(b) in connection with that review.

The Legislative History (Volume 2, page 429) of the Act demonstrates that Congress intended participation in the annual review by interested parties both orally and in writing:

> The Authority shall afford interested parties an opportunity to comment on the proposed determination and publish the determination of revised net subsidies or margins of dumping in the Federal Register, including the bases for the assessment of duties on the merchandise included within the determination. (statute)
>
> * * * * * * *
>
> Whenever the Authority or the Commission conducts a review, it shall, upon the request of any interested party, permit the presentation of written and oral views in connection with that review. (statute)

Plaintiff also requests that Commerce be directed to designate the period of review as being from July 1, 1976 through July 30, 1980 and that Hsinchu by required to report all its exports of clear glass to the United States during that period. This court considers such a directive unnecessary in view of the statutory language of the Act that requires the administering authority to consider every entry subject to the original final determination and determine the amount, if any, by which the foreign market value of each such entry exceeds its United States price. Section 751(2) (A) and (B) of the Act. We shall not presume that Commerce does not understand its duties under the statute and how the dumping margin is to be determined.

It is, accordingly,

ORDERED, that this matter be, and the same here is remanded to the Department of Commerce for a reconsideration of the annual review of clear sheet glass from Taiwan, consistent with this opinion, and it is further

ORDERED, that plaintiff's motions for remand with instructions be and the same hereby is denied, and it is further

ORDERED, that upon completion of the agency redetermination, plaintiff shall have the opportunity to amend its complaint in light of the agency's redetermination within thirty days from the date thereof.

(Slip Op. 83–76)

UNITED STATES STEEL CORPORTATION, REPUBLIC STEEL CORPORATION, ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS and HIGHVELD LIMITED, COMPANHIA SIDERURGICA PAULISTA (COSIPA), and USINAS SIDERURGICAS de MINAS GERAIS (USIMINAS), DEFENDANTS-INTERVENORS

Consolidated Court No. 82-10-01361

Before WATSON, *Judge.*

Memorandum Opinion and Order on In-House Counsel Access to Confidential Business Information

The Court decides not to grant access to business confidential information to in-house counsel for United States Steel Corporation.

[Motion for access denied.]

(Decided July 22, 1983)

Law Department of United States Steel Corporation (D.B. King, J.J. Mangan, C.D. Mallick, L. Ranney and *P.J. Koenig* of counsel) *for plaintiff United States Steel Corporation.*

Cravath, Swaine & Moore (Joseph R. Sahid and *Steven Schulman* of counsel) for plaintiffs, Republic Steel Corporation, Inland Steel Company, Jones & Laughlin Steel Incorporated, National Steel Corporation, and Cyclops Corporation.

J. Paul McGrath, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch *(A. David Lafer* and *Francis J. Sailer,* attorneys, Commercial Litigation Branch) for the federal defendants.

Wald, Harkrader & Ross (William H. Barringer, Christopher A. Dunn and *Arthur J. Lafave III* of counsel) for defendants-intervenors COSIPA and USIMINAS.

WATSON, *Judge:* In this opinion, the Court answers the difficult question of whether to allow in-house or corporate counsel to have access to confidential information regarding the business of their employer's competitors. The question was raised in *United States Steel Corp.* v. *United States,* Consolidated Court No. 82-3-00288; but the settlement of the steel dispute with the European Community made the issue moot.[1] Now the issue has been raised once more in this motion [2] by U.S. Steel for access to the business confidential portions of the record. These are portions of the record of the final countervailing duty determinations on carbon plate steel from South Africa [3] and Brazil.[4] To the extent that it claims that these determinations were not supported by substantial evidence, there is no doubt that U.S. Steel has a need for access.

There is also no question that the information sought contains confidential business data of U.S. Steel's competitors in South Africa and Brazil, and could cause significant harm to them if used outside this judicial review. An *in camera* examination by the Court was sufficient to show that this information contains revealing financial, production, and sales data.

The statute which governs this dispute is part of the law which provides for judicial review on the administrative record. At 19 U.S.C. § 1516a(b)(2)(B) it provides as follows:

> (B) *Confidential or privileged material.*—The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section.

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[1] At the request of U.S. Steel, its memorandum of August 6, 1982, the brief of *amicus* Corporate Counsel of August 9, 1982 and the transcript of the oral argument held on August 19, 1982, all from Court No. 82-3-00288, have been incorporated in this record and reviewed by the Court.

[2] U.S. Steel points out that it merely proposed an order in response to a motion for a protective order with regard to documents designated as "business confidential" in the administrative record, which was filed by the government in February. In any event, the issue of access for in-house counsel has been raised and fully briefed.

[3] 47 Fed. Reg. 3,379 (1982).

[4] 48 Fed. Reg. 2,568 (1983).

> Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

This provision has been held to require the normal balancing test which courts make between the need for the information and the need for maintenance of confidentiality. *Connors Steel Co.* v. *United States,* 85 Cust. Ct. 112, C.R.D. 80–9 (1980). *Roquette Freres* v. *United States,* 4 CIT —, Slip Op. 82–111 (Dec. 13, 1982).

In this case, the test is complicated by the fact that disclosure is requested for in-house counsel, the only ones who have been representing U.S. Steel in these matters. The Court has previously shown a reluctance to release confidential business information to the in-house counsel of competitors. It expressed this reluctance briefly in *Atlantic Sugar Ltd.* v. *United States,* 85 Cust. Ct. 133, C.R.D. 80–18 (1980) when it stated as follows:

> The court is of the opinion that in actions such as these the confidential business information of business competitors should not be disclosed to in-house counsel unless a party has no other reasonable way of adequately preparing and presenting its arguments. This preference is not based on any reservation as to the integrity of in-house counsel but is intended to avoid placing them under the unnatural and unremitting strain of having to exercise constant self-censorship in their normal working relations.

At this time the Court, in the necessary exercise of its descretion, has to extend its reasoning to in-house counsel for U.S. Steel. This carries with it the conclusion that in the present circumstances the retention of outside counsel remains a reasonable way for U.S. Steel to satisfy its need for this information.

It is only because the Court sees this information as having ineradicable importance that it takes this step. In the combination of its detail, and its scope, the information is extremely potent. Its nature and volume place it beyond the capacity of anyone to retain in a consciously separate category. When the Court said in *Atlantic Sugar* that it was acting out of a desire of avoid placing lawyers under an unnatural and unremitting strain, it was really expressing its rationale indirectly and incompletely as a form of solicitude for the lawyers. The direct and complete reason is that, in the Court's judgment, it is humanly impossible to control the inadvertent disclosure of some of this information in any prolonged working relationship.

Obviously, this judgment can also apply to retained counsel in certain situations. It is impossible, however, to extend this reasoning to its logical conclusion and still have adversary proceedings and judicial review as contemplated by 19 U.S.C. § 1516a(b). So the distinction between in-house counsel and retained counsel is made because with respect to the former, a closer and more sustained re-

lationship can be presumed as an outgrowth of the employer-employee relationship. It follows that a meaningful increment of protection can be obtained by excluding in-house counsel.

The Court's rationale has absolutely nothing to do with the possibility of deliberate disclosure of this information. The integrity of counsel for U.S. Steel is unquestioned and their unblemished record of adherence to protective orders is acknowledged.

The Court also accepts the representation that in-house counsel herein do not have direct involvement in pricing or other competitive decision-making. Nevertheless, the Court's concerns arise more from counsel's general position in the corporate environment than their specific duties. If they are somewhat isolated, it is still within a rather worldly cloister. In addition, the Court has to make some reasonable assumptions that they will move into other roles and functions and that the compartmentalization of this information will become even more difficult.

The Court simply sees a greater likelihood of inadvertent disclosure by lawyers who are employees, committed to remain in the environment of a single company. The factor of permanent employment by one company is a rational means by which to distinguish between lawyers. It is not a perfect distinction; but it is a reasonable one. It does not result in an elimination of risk; but it does offer a significant increase in protection.

It resembles the precautions taken in the manufacture, transportation, use, or storage of highly dangerous substances. The consequences of an accident are thought to be so catastrophic that steps which might ordinarily appear excessive, or burdensome, or which add only a modest incremental measure of safety, are justified.

We are concerned here not with physical safety upon which lives depend, but with the safety of information upon which livelihoods depend. The rationale is the same. The greater the dangerous potential of the substance involved, the greater the caution with which it must be handled.

The Court has found no persuasive precedent to suggest that release to in-house counsel is advisable. First of all, in the eyes of the Court, the magnitude of the information involved here distinguishes this situation immediately from the cases in which in-house counsel were permitted access to the confidential information of competitors. Furthermore, there are other distinctions.

The case with the closest factual pattern involved a Federal Trade Commission investigation under 15 U.S.C. §45 in which detailed cost information for a number of products of a cereal manufacturer were released to counsel for competitors without being limited to retained counsel. *F.T.C.* v. *J. R. Lonning,* 539 F2d 202, (D.C. Cir. 1976). In that case the terms of the protective order of the administrative judge were affirmed by the District Court and that was found not to be an abuse of discretion. However, the release to in-house counsel appears to have been more the result of a

failure by the manufacturer to keep asserting its argument for limitations before the administrative judge than a reasoned necessity. 539 F2d at 210 and 211. In any event, the decision does not offer a guide to the exercise of judicial discretion in such matters but simply the approval of a single, opaque exercise of discretion.

The release of confidential information to in-house counsel in *Baxter Travenol Laboratories Inc.* v. *Lemay,* 89 F.R.D. 410 (D.C.S.D. Ohio, 1981) was based on the court's satisfaction that *active misuse* of the material would not occur. That court's concern was satisfied by a decision that the attorney in question could be expected to maintain a differentiation between proper use in the litigation and improper use for other business purposes. From the opinion, it appears that the improper business purpose which most concerned the objecting party was the allegedly anticompetitive litigation in which the access dispute was arising. On this point the Court was dealing primarily with a claim of unfair competition by means of litigation, rather than the prospect of misuse of confidential information in the normal competitive arena. In any event, the Court was evidently not concerned with inadvertent disclosure. Moreover, this Court does not believe that the information involved here can be so easily differentiated and compartmentalized.

The Supreme Court's refusal to make distinctions between corporate attorneys and outside counsel in *Upjohn Co.* v. *United States.* 449 U.S. 383 (1981) does not provide guidance for this situation. That decision established that the relationship between in-house counsel and the corporate client carries with it the normal privilege protections for the client's communications. It has nothing to do with the risks involved in the access to confidential information of other corporations or the proper distinctions that may be made in those cases.

None of these cases provide a persuasive rationale for not taking the most conservative measures to safeguard highly confidential information. It is also noteworthy that we are speaking of an area in which confidentiality has been a stated concern of Congress and the maintenance of confidentiality has been specifically provided for in the law.

The Court does not believe that its ruling infringes on Constitutional rights. It has difficulty conceiving of the right of a particular lawyer to participate in a case, or the right of a person to choose a particular lawyer, as being superior to the right of a party to have its confidential information meaningfully protected in litigation.

There is no shortage of cases in which in-house counsel have been denied access to confidential information. *See F.T.C.* v. *Exxon Corp.,* 636 F2d 1336 (D.C. Cir. 1980) and cases cited therein. It seems that each court must grapple with this problem in the light of its own evaluation of the information involved, the risks presented and the possible consequences.

In making this ruling, and in the exercise of its discretion, the Court relies on its own evaluation of the risks of disclosure. It does not rely on the fears of respondents in the administrative proceedings that their confidential information may be used improperly or on the related concern of the agencies that important sources of information for informed decision-making will refuse to fully cooperate. Those from whom the agencies request information should comply with the requests and trust to the measured protections provided by law. As stated previously, the Court's concern here is solely with the greater risk of *inadvertent* disclosure within the corporate setting.

For the reasons given above, the Court will not grant access for in-house counsel to the requested business confidential information set out in the proposed order of United States Steel Corporation and their motion is DENIED.

(Slip Op. 83-77)

MANUFACTURE DE MACHINES DU HAUT-RHIN, PLAINTIFF *v.* WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, UNITED STATES CUSTOMS SERVICE and INTERNATIONAL ARMAMENT CORP., DEFENDANTS

Before CARMAN, *Judge.*

Court No. 83-2-00286

Memorandum

[Motion to dismiss granted.]

(Dated July 25, 1983)

Klein & Vibber, (*Arthur O. Klein* & *Thomas A. Gallagher* on the motion) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, (*Michael P. Maxwell* on the motion) for the federal defendants.

Crowell & Moring, (*Peter B. Work* on the motion) for the defendants.

CARMAN, *Judge:* This matter is before me on plaintiff's motion for a preliminary injunction and federal defendants' cross-motion to dismiss. Defendant, International Armament Corporation ("Interarms") has responded to both motions.

The issues presented by these motions include whether this court has jurisdiction either pursuant to 28 U.S.C. § 1581(h), 28 U.S.C. § 1581(i) or 28 U.S.C. § 1585 (Supp. IV 1980) and if jurisdiction does exist whether or not the elements necessary for a preliminary injunction are present.

This action contests a ruling by the United States Customs Service ("Customs"), excluding from the United States, pistols manufactured by plaintiff, Manufacture de Machines du Haut-Rhin ("Man-

urhin"), which held the imprint of the words "LIC. EXCL. WALTHER" and "LIC. WALTHER PP" infringed upon Walther trademarks owned by defendant Interarms.

Carl Walther, Gmbh ("Carl Walther"), a German manufacturing firm, registered in 1925 its "WALTHER IN DESIGN" trademark in Germany. In the early 1930's, it became the registered owner of the United States trademark "WALTHER IN DESIGN". Pistols manufactured by Carl Walther bearing the trademark gained a reputation for high quality, reliability and performance.

Carl Walther lost its production facilities after World War II and was unable to continue manufacturing pistols. As a result of this loss of production capability, Carl Walther licensed Manurhin to manufacture "WALTHER PP and PPK" pistols according to Walther specifications. Manurhin has continued to manufacture the pistols without interruption pursuant to similar license renewal agreements. The most recent license renewal was in 1982 for a term of five years.

Interarms has for twenty years been an importer of Walther firearms. Although the facts are not entirely clear, it seems Interarms obtained, in 1969, a representative agreement from Carl Walther to distribute Walther firearms in the United States. In 1977, Interarms apparently secured from Carl Walther a license for 15 years with an automatic extension of 10 years for the exclusive right to manufacture and distribute "PP, PPK and PPK/S" type Walther pistols in North America. The license agreement purportedly granted Interarms the exclusive right to import and distribute all other Walther firearm products in the United States.

Carl Walther assigned in 1981 its trademark "WALTHER IN DESIGN" Reg. No. 303,701, to Interarms. The trademark was recorded with Customs for import protection effective November 2, 1981.

The Customs Service, acting in February, 1982 pursuant to section 526 of the Tariff Act of 1930, 19 U.S.C. § 1526 (1976 & Supp. III 1979),[1] detained two small shipments of pistols marked "LIC. EXCL. WALTHER." These pistols were manufactured by Manurhin. Manurhin was not the importer. The pistols were imported by two companies, EJK Devco, Inc., and Heckler and Koch.

Customs decided in June, 1982, that the terms "LIC WALTHER PP" and "LIC. EXCL. WALTHER" had no trademark significance and appeared on the pistols in question merely to indicate that the patent holder had licensed Manurhin to manufacture and sell pistols under their patent rights. The Customs decision expressed the

[1] Section 526 provides:

* * * it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said title 15, unless written consent of the owner of such trademark is produced at the time of making entry.

opinion that the name "WALTHER" was a trade name usage rather than a trademark, and noted the presence of the Manurhin (water wheel) trademark in a prominent location on the pistols.

Carl Walther assigned to Interarms the U.S. trademark "Walther", Reg. No. 1,120,867, which was then duly recorded on July 14, 1982, with Customs for import protection.

Interarms asked Customs to reconsider its June, 1982 decision which found the terms "LIC. WALTHER PP" and "LIC. EXCL. WALTHER" had no trademark significance. Customs upon reconsideration found, on January 20, 1983, that since Interarms was the owner in the United States of the trademark "WALTHER" and had recorded both the "WALTHER" and "WALTHER IN DESIGN" trademarks with Customs for import protection, that pistols bearing the words "LIC. EXCL. WALTHER" and "LIC. WALTHER PP" should be prohibited from entry into the United States. The reconsideration decision observed that the manner and number of times the term "WALTHER" was used on the pistols was evidence that the term was being employed in a trademark sense to associate the pistols with Walther and not merely in a descriptive sense to indicate the pistols were manufactured under a license granted by Walther to Manurhin.

Manurhin filed an action in November, 1982, in the United States District Court for the Eastern District of Virginia, challenging Interarms' trademark rights in the name "WALTHER". The action was dismissed without prejudice.[2]

Manurhin filed this action demanding declaratory judgment relief. Manurhin requested this court find that defendant Interarms could not register the trademark "WALTHER" and "WALTHER IN DESIGN" because the assignment from Carl Walther (not a party in this action) to Interarms did not transfer ownership in the marks to Interarms. Defendant Interarms filed an answer and a counterclaim. The counterclaim requested this court to enjoin Manurhin from dealing in merchandise bearing the same mark or any mark confusingly similar to either of the Walther trademarks. Manurhin moved subsequently for a preliminary injunction. The federal defendants cross-moved to dismiss. Interarms responded to both motions.

JURISDICTION

Although a variety of issues have been presented, the threshold question, raised by federal defendants' motion to dismiss, is whether or not this court has jurisdiction to review the ruling of Customs.

[2] Plaintiff sought a declaratory judgment as well as an injunction preventing defendant Interarms from petitioning the Customs Service to bar the import of pistols manufactured by plaintiff bearing the "WALTHER" mark. The action was dismissed without prejudice in the United States District Court.

When a jurisdictional issue is raised, the burden rests on the plaintiff to prove that jurisdiction exists. *United States* v. *Biehl & Co.*, 3 CIT 158, 160, 539 F. Supp. 1218, 1220 (1982).

Plaintiff argues that the court has jurisdiction pursuant to 28 U.S.C. § 1581 (h) and (i), and 28 U.S.C. § 1585 (Supp. IV 1980). Defendants contend that none of the above sections confer jurisdiction upon the court and judicial review should be entertained pursuant to section 1581(a), after plaintiff has exhausted its administrative remedies. It is with this general argument of the defendants that the court agrees. A discussion of each assertion of jurisdiction follows.

28 U.S.C. § 1581(h)

Plaintiff contends that it should not be required to exhaust its administrative remedies in the traditional sense by completing an import transaction, filing a protest and contesting the denial of the protest. Plaintiff asserts, although not alleged in the complaint, that the court has jurisdiction pursuant to section 1581(h) and the traditional method of obtaining judicial review should be circumvented because it will suffer irreparable harm if further delay is encountered. Subsection (h) of section 1581 provides:

> * * * The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

It is clear that section 1581(h) grants this court jurisdiction to review pre-importation rulings under limited circumstances where an importer may suffer irreparable harm if he is unable to obtain judicial review of a ruling until a contemplated transaction is completed, the duties are paid and a suit is commenced.[3] In the case at

[3] H.R. Report No. 1235, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 3758 stated as follows:

Subsection (h) of proposed section 1581 is also a new grant of subject matter jurisdiction to the Court of International Trade. It provides that the court may review "prior to the importation of the goods involved," a ruling or a refusal to issue or change a ruling by the Secretary of the Treasury regarding such issues as the classification, valuation, or rate of duty of those goods. At present, judicial review of a ruling can be obtained only by completing an import transaction in accordance with the ruling and then proceeding to obtain judicial review in the usual manner, that is filing a protest, paving the duties and contesting the denial of the protest.

The Committee recognizes that in certain instances a person can be injured if he is unable to obtain judicial review of a ruling by the Secretary of the Treasury unless and until the contemplated transaction is completed, the duties are paid and a suit is commenced in the Customs Court. Thus, it may be appropriate in limited circumstances to permit judicial review prior to the completion of the transaction or payment of the duties. Many of the witnesses who testified before the Subcommittee agreed, including the Departments of Justice and the Treasury.

The time-honored rule is that the court does not possess jurisdiction to review a ruling or a refusal to issue or change a ruling by the Secretary of the Treasury unless it relates to a subject matter presently within the juris-

Continued

hand, the determination made by Customs was not a pre-importation ruling, since the goods in question were detained when there was an attempt to import them. Furthermore, plaintiff has not demonstrated that it would suffer irreparable harm as contemplated by section 1581(h).

The irreparable harm contemplated by section 1581(h) is the harm that may be visited upon an importer by requiring the importation of merchandise and requiring the importer to go through the administrative process of protesting its exclusion. The harm argued by Manurhin is harm resulting from the exclusion of merchandise—lost profits, lost opportunities to make agreements for sale of its product, lost goodwill, and tarnished good name. See affidavit of Daniel Chovet.[4]

In addition to the court finding Mr. Chovet's arguments highly speculative, the harm addressed was not that of importing merchandise and going through the administrative process, but rather the possible harm of the exclusion. To permit the plaintiff to use section 1581(h) as requested, would circumvent the system of review Congress created and use section 1581(h) in a way that was not intended by Congress. Section 1581(h) is generally to be applied on occasions where an importer can show that it should be granted an anticipatory ruling from Customs in order to avoid incurring irreparable harm in connection with the commencement of an import transaction. Plaintiff in this case has not attempted to import nor has it made a showing that such an import would present any special or particularly difficult problems.

As the federal defendants point out, the legislative history further reveals the limited application of section 1581(h), see footnote 3. Furthermore, since the legislative history concerning the meaning of the word "irreparable" appears silent, it is useful to examine its plain meaning in broad equitable terms. Irreparable injury has been defined as follows:

> * * * This phrase does not mean such an injury as is beyond the possibility of repair, or beyond possible compensation in damages, or necessarily great damage, but includes an injury, whether great or small, which ought not to be submitted to, on

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diction of the United States Customs Court, for example, an action brought pursuant to section 515 of the Tariff Act of 1930. The Committee intends a very narrow and limited exception to that rule. The word "ruling" is defined to apply to a determination by the Secretary of the Treasury as to the manner in which it will treat the contemplated transaction. In determining the scope of the definition of a "ruling," the Committee does not intend to include "internal advise" or a request for "further review", both of which relate to completed import transactions.

[4] The affidavit of Mr. Chovet sets forth some general background and the good reputation of Manurhin as a manufacturer. Mr. Chovet stated that American companies have expressed an interest to sell WALTHER pistols manufactured by Manurhin in the United States; however, these negotiations were not followed through because of the agreement with Interarms. Mr. Chovet asserted that because of the January 1983 Customs Service ruling, Manurhin cannot conclude any possible commercial contracts with American firms. However, Mr. Chovet did not name any American companies or state that the actual completion of any contracts were pending.

Mr. Chovet further stated that "since American companies can no longer buy the United States WALTHER pistols marked 'MANURHIN LIC. EXCL. WALTHER' or 'MANURHIN LICENSE WALTHER,'" these companies, and in particular their American purchasing agents, may think that MANURHIN is, or has, become an infringee, a pseudomanufacturer or a bad manufacturer of WALTHER pistols.

> the one hand, or inflicted, on the other, and which, because it is so large or so small, or is of such constant and frequent occurrence, or because no certain pecuniary standard exists for the measurement of damages, cannot receive reasonable redress in a court of law. Wrongs of a repeated and continuing character, or which occasion damages that are estimated only by conjecture, and not by any accurate standard, are included.

Black's Law Dictionary 706–707 (5th ed. 1979.)

It is clear that it was not the intent of Congress to allow review prior to an import without the showing of exceptional circumstances required by section 1581(h). Absent these exceptional circumstances, the traditional methods of obtaining judicial review must be employed. There has been no showing that Manurhin does not have the ability to import a test shipment of pistols and file a protest against any adverse decision by Customs. The irreparable injury alleged by Manurhin is not the type of injury which section 1581(h) was intended to avoid.[5]

II

28 U.S.C. § 1581(i)

It is further asserted by the plaintiff that section 1581(i) provides this court with jurisdiction. Subsection (i) of section 1581 reads as follows:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) Revenue from imports or tonnage;
>
> (2) Tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) Embargoes or other quantitative restrictions on the importation of merchandise for reasons other than protection of the public health or safety; or
>
> (4) Administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

With respect to the claimed jurisdiction under 28 U.S.C. § 1581(i) (Supp. IV 1980), it must be first noted that section 1581(i) cannot be used to circumvent the procedures set forth by section 1581(a). See *United States* v. *Uniroyal,* CCPA—, 687 F.2d 467 (1982). *Uniroyal,* the court specifically stated that "The jurisdiction of the Court of International Trade under § 1581(i) is expressly 'in addition to the jurisdiction conferred * * * by subsections (a)–(h),' and that the legislative history of § 1581 further evidences Congress' intention that subsection (i) not be used generally to bypass administrative review by meaningful protest." 687 F.2d at 472.

The administrative procedure applicable in the case at hand is triggered by a Customs exclusion of an importer's merchandise at

[5] It is noted here that plaintiff's assertion of jurisdiction under section 1581(h) is inconsistent with its request for a preliminary injunction since subsection (h) only provides for declaratory relief.

point of entry. At that point, the importer can protest the exclusion.[6] If Customs denies the protest, judicial review may occur pursuant to 28 U.S.C. § 1581(a) (Supp. IV 1980).[7]

Plaintiff has never attempted to import merchandise and consequently has never had any merchandise excluded. There has been no showing that plaintiff cannot import a small shipment of the pistols in question, file a protest upon exclusion, and exhaust its administrative remedies.

This court has subject matter jurisdiction under section 1581(i) of a cause of action, which might otherwise be available under section 1581(a), only when the relief available under section 1581(a) is manifestly inadequate or necessary because of special circumstances to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies. *Lowa Ltd.* v. *United States,* 5 CIT—, Slip Op. 83.15, (March 16, 1983). *United States Cane Sugar Refiners' Association* 69 CCPA—, 683 F.2d 399 1982. There has been no indication in this case that section 1581(a) is inadequate or special circumstances demand assumption of jurisdiction under section 1581(i).

III

28 U.S.C. § 1585

Plaintiff lastly asserts jurisdiction under section 1585 which reads as follows:

> The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.

This assertion of jurisdiction by plaintiff is simply without merit. Section 1585 does not grant jurisdiction to the Court of International Trade, but rather confers the ability to grant injunctive relief to the court. *Kidco, Inc.,* v. *United States,* 4 CIT —, Slip Op. 82–71 (Sept. 8, 1972).

Section 1585 fulfills the intent of Congress to give the Court of International Trade the same equitable powers as a Federal district court. The legislative history of section 1585 reveals the following:

> Proposed section 1585 provides that the Court of International Trade shall possess all the powers in law and equity of, or conferred by statute upon a district court. In the past, there has been some doubt as to whether or not the Customs Court possessed this full judicial authority. It is the Committee's intent to make clear that the Customs Courts successor, the

[6] Section 1514(a)(4) of Title 19 provides that a protest may be filed with respect to, "The exclusion of merchandise from entry or delivery under any provision of the customs laws."

[7] Section 1581(a) of Title 28 provides: "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930."

> United States Court of International Trade, does possess the same plenary powers as a Federal district court.

H.R. Rep. No. 1235, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3762.

Therefore, since section 1585 is not a jurisdictional grant but rather a grant of equitable powers, plaintiff's assertion of jurisdiction under section 1585 is inappropriate.

CONCLUSION

For the above-mentioned reasons, this court is without subject matter jurisdiction in this matter. Given this determination, the federal defendants' motion to dismiss must be, and hereby is, GRANTED.

It is so ordered.

(Slip Op. 83–78)

GENE MILLER, PLAINTIFF *v.* RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANT

Court No. 81–2–00121

Before RE, *Chief Judge.*

On Motion for Review of Administrative Determination Upon Agency Record

[Administrative determination of the Secretary of Labor denying certification of eligibility for worker adjustment assistance benefits affirmed.]

(Dated July 27, 1983)

Gene Miller, pro se.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Sheila N. Ziff* on the brief), for the defendant.

RE, *Chief Judge.* Plaintiff challenges the Secretary of Labor's determination denying certification of eligibility for trade adjustment assistance benefits to plaintiff and other former employees of an automobile dealership, Star Lincoln-Mercury Incorporated, Southfield, Michigan. The Secretary determined that the employees at Star Lincoln-Mercury failed to satisfy the third eligiblity criterion of section 222 of the Trade Act of 1974, 19 U.S.C. § 2272 (1976). Specifically, the Secretary found that plaintiff and his fellow employees were service workers employed by a firm that did not "produce" an article adversely affected by increased imports.

Section 222 provides, in pertinent part:

> The Secretary of Labor shall certify a group of workers as eligible to apply for adjustment assistance * * * if he determines—
>
> (1) That a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm

have become totally or partially separated, or are threatened to become totally or partially separated,

(2) That sales or production, or both, of such firm or subdivision have decreased obsolutely, and

(3) That increases of imports of articles like or directly competitive with *articles produced* by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production. [Emphasis added.]

* * * * * * *

On July 15, July 25 and September 2, 1980, separate groups of employees from Star Lincoln-Mercury filed petitions with the Department of Labor's Office of Trade Adjustment Assistance (OTAA) seeking certification of eligibility for worker adjustment assistance benefits. OTAA returned each petition stating that the employees performed services and, therefore, were ineligible for benefits under the Trade Act of 1974. Thereafter, the employees sought administrative reconsideration alleging that Star Lincoln-Mercury was owned and controlled by Ford Motor Company.

Based on the allegation, OTAA accepted the petitions, TA–W–11,067, and commenced an investigation. OTAA published a notice to that effect in accordance with section 221(a) of the Trade Act of 1974, 19 U.S.C. § 2271(a) (1976) and 29 CFR § 90.12 (1980). 45 Fed. Reg. 65704, 65705 (1980). The investigation disclosed the Star Lincoln-Mercury (the firm) was an independently owned and operated franchised automobile dealership. The firm conducted its business with a single supplier, Ford Motor Company, under the terms of a sales and service agreement. Neither Ford nor Star Lincoln-Mercury had a controlling interest in the other. Mr. Stanley Wilk, the firm's president, described the nature of the work performed by the employeees as being the sale and servicing of Lincoln-Mercury cars and trucks.

Based on its investigation, OTAA found that the firm was engaged exclusively in providing a service, and that it performed no production operations. The Secretary thus determined that, under his interpretation of section 222 of the Act, the firm's employees were ineligible for worker adjustment assistance benefits. 45 Fed. Reg. 79950, 79951 (1980).

Subsequently, on January 20, 1981, plaintiff commenced this action seeking judicial review of the Secretary's final determination pursuant to section 284(a) of the Trade Act of 1974, 19 U.S.C. § 2395(a) (Supp. IV 1980). Plaintiff proffers two reasons for reversal of the Secretary's negative determination. He first maintains that the Secretary wrongly interpreted the term "produced" in section 222(3) to apply only to workers who manufacture an import-impacted article. Plaintiff's second contention is that, as a practical matter, the Secretary's statutory interpretation has resulted in dis-

similar treatment of similarly situated workers. Specifically, plaintiff asserts that the employees of Star Lincoln-Mercury were denied certification, while those at another new car agency, Patmon Oldsmobile, received certification.

Upon reviewing the administrative record herein, the court finds the Secretary's denial of certification supported by substantial evidence and in accordance with law.

The two issues raised by plaintiff were examined and discussed in this court's opinion in *Woodrum* v. *Donovan,* 5 CIT —, Slip Op. 83-43 (May 10, 1983). There, the court affirmed the Secretary's determination that employees of independently owned automobile dealerships were ineligible for trade adjustment assistance benefits inasmuch as they were service workers who did not produce an import-impacted article.

On the question of the breadth of the term "produced," *Woodrum* held that "production under section 222(3) requires the manufacture or creation of something tangible." Slip Op. at 16. Ultimately, the test for workers seeking certification in whether they transformed articles on which they devoted their labors into something new and different. Ibid.; *Pemberton* v. *Marshall,* 639 F. 2d 798 (D.C. Cir. 1981).

As in *Woodrum* and *Pemberton,* plaintiff performed work on tangible articles, namely Lincoln-Mercury cars and trucks. Their work, however, consisted solely of selling and servicing completed articles. Plaintiff has failed to sustain his contention that the firm "produced" an import-impacted article. The record is devoid of any evidence showing that plaintiff or any other employee of Star Lincoln-Mercury transformed cars and trucks into new end products

Plaintiff also asserts he is entitled to relief based on the Secretary's determination certifying the employees of Patmon Oldsmobile Inc., TA-W-7269. 45 Fed. Reg. 51963, 51966 (1980). Plaintiff maintains that the Secretary's interpretation of section 222 has resulted in the creation of two classes of new car agency employees, *i.e.,* those who work for an independently owned and operated dealership, such as Star Lincoln-Mercury, and those who work for a dealership, such as Patmon, owned or substantially controlled by an automobile manufacturer.

This question was also examined in *Woodrum.* Based on similar facts, this court held that a differentiation in treatment, assuming all other requirements of section 222 were met, served a reasonable Government interest and was therefore permissible. This dissimilar treatment does not "result from an arbitrary, capricious or improper distinction," but rather "from a proper construction of the pertinent statute * * *." Slip Op. at 21. In sum, the distinction results from section 222 itself, and not from the Secretary's interpretation or application of that section.

There is no doubt that this action, in all relevant respects, is identical to *Woodrum. Thus, under stare decisis, Woodrum* is controlling. Accordingly, the court concludes that the Secretary of Labor's denial of certification is supported by substantial evidence and in accordance with law. The Secretary's determination is therefor affirmed.

Decisions of the United States Court of International Trade

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *July 28, 1983.*

The following abstracts of decisions of the United States Court of International Trade at New York are published for the information and guidance of officers of the Customs and others concerned. Although the dicisions are not of sufficient general interest to print in full, the summary here given will be of assistance to Customs officials in easily locating cases and tracing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/221	Re, C.J. July 25, 1983	Chrysler Corp.	71–5–00099	Item 696.15 12%, 10.5%, 9.5%, 8%, 7% or 6%	Item 680.45 8%,7%, or 6% For duty purposes, the value of the outboard drives shown on commercial invoices for entry 1033608 of 4/2/68 shall be $243.00 each	Eaton Manufacturing Co. v. U.S. (C.D. 4571)	New York Outboard drives
P83/222	Re, C.J. July 25, 1983	Electronic Arrays, Inc.	80–9–01425	Item 716.05 Not stated Item 720.75 Not stated	Item 688.40 5.5% Item 687.60 6%	Judgment on the pleadings	San Francisco Watch modules and watch integrated circuits
P83/223	Re, C.J. July 25, 1983	Scheer & Spring, Ltd., et al.	79–8–01348, etc.	Item 702.47 Column two rates of duty	Item 702.47 $1.02 per doz. + 5%	Agreed statement of facts	New York Ladies' straw hats
P83/224	Re, C.J. July 25, 1983	Standard Sales, Inc.	78–9–01555	Item 705.35 15%	Item 734.97 9%	Stonewall Trading Co. v. U.S. (C.D. 4023)	Los Angeles Style No. 635 men's cowhide grain leather ski gloves
P83/225	Re, C.J. July 25, 1983	United Tire and Rubber Co., Limited	81–8–01113, etc.	Item 772.51 4%	Item 772.50 Free of duty	Agreed statement of facts	Buffalo Pneumatic tires of rubber or plastic for tractors
P83/226	Newman, J. July 25, 1983	Federal Pacific Electric Co.	79–9–01471	Item 682.05 12.5%	Item 682.07 6%	Summary judgment	Buffalo Ground fault sensors or sensing transformers

P83/227	Boe, J. July 25, 1983	E. Gluck Corp.	81-1-00034	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/228	Boe, J. July 26, 1983	E. Gluck Corp.	81-1-00036	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

P83/229	Boe, J. July 26, 1983	E. Gluck Corp.	81-4-00451	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, or 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting or modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/230	Boe, J. July 26, 1983	E. Gluck Corp.	81-8-01099	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

P83/231	Boe, J. July 26, 1983	E. Gluck Corp.	81-9-01235	Item 715.05 Various rates (modules) Item 720.24 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1% or 23.1%, 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/232	Boe, J. July 26, 1983	E. Gluck Corp.	81-10-01447	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 23.1% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 [6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

P83/233	Boe, J. July 27, 1983	Magnavox Consumer Electronic Co.	81-5-00623	Item 716.18, 720.02, 720.14 and 720.16 Various rates	Item 685.40 5.5% or 5.3% Merchandise assessed on basis of export value equal to sum of appraised values of radio receivers and tape recorders and timepiece portions	Texas Instruments, Inc. v. U.S. 1 CIT 236 (1981) aff'd 3/25/82 No. 81-23	Los Angeles AM/FM clock radios
P83/234	Boe, J. July 27, 1983	Magnavox Consumer Electronic Co.	81-12-01658, etc.	Item 720.14, 720.16 and 720.18 Various rates	Item 685.24 9.9% or 9.3% Merchandise assessed on basis of export value equal to sum of appraised values of radio receivers and timepiece portions	Texas Instruments, Inc. v. U.S. 1 CIT 236 (1981) aff'd 3/25/82 No. 81-23	Los Angeles AM/FM clock radios

Decisions of the United States Court of International Trade

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/506	Re, C.J. July 25, 1983	MRD & Associates	73-11-03089	Export value	Appraised values specified on entry papers by liquidating officer less additions included which reflect currency revaluation	C.B.S. Imports Corps v. U.S. (C.D. 4739)	San Francisco Not stated
R83/507	Re, C. J. July 25, 1983	Toshiba International Corporation	78-10-01750	Export value	Invoice unit value without addition for currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated
R83/508	Re, C. J. July 25, 1983	Zado Goldenberg, Inc.	75-2-00353	Export value	Invoice unit value without any addition for currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Not stated

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/509	Maletz, S.J. July 25, 1983 (amends decision and judgment of Feb. 24, 1983, Abs. R83/259)	Perkin Elmer Corp.	78-12-02104	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing the correct dutiable value—said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Electrical instruments and accessories
R83/510	Maletz, S.J. July 25, 1983 (amends decision and judgment of Feb. 23, 1983, Abs. R83/239	Perkin Elmer Corp.	78-12-02105	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing correct dutiable value—said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Electrical instruments and accessories
R83/511	Maletz, S.J. July 25, 1983 (amends decision and judgment of Feb. 24, 1983, Abs. R83/260)	Perkin Elmer Corp.	78-12-02106	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing correct dutiable value—said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Electrical instruments and accessories
R83/512	Maletz, S.J. July 25, 1983 (amends decision and judgment of Feb. 23, 1983, Abs. R83/240)	Perkin Elmer Corp.	78-12-02109	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing correct dutiable value—said prices represent exporter's lst prices less 35% discount	Agreed statement of facts	New York Electrical instruments and accessories

R83/513	Re, C.J. July 27, 1983	Dorfman Pacific Co., Inc.	73-8-02193	Export value	Appraised values specified on entry papers by liquidating officer, less any additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated
R83/514	Re, C.J.	East Bay Tire Co.	74-9-02660	Export value	Appraised values specified on entry papers by liquidating officer, less any additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated
R83/515	Re, C.J. July 27, 1983	Mundo Corp.	73-7-01825	Export value	Appraised values specified on entry papers by liquidating officer, less any additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Shower head
R83/516	Re, C.J. July 27, 1983	Rolf Gille Import Co.	73-8-02196	Export value	Appraised values specified on entry papers by liquidating officer, less any additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated

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